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A TREATISE
ON
THE CANADIAN LAW OF
CONDITIONAL SALES
OF CHATTELS,
AND OF
CHATTEL LIENS,

WITH REFERENCES TO THE STATUTES OF THE PROVINCES
OF ONTARIO, NOVA SCOTIA, BRITISH COLUMBIA,
MANITOBA, QUEBEC, NEW BRUNSWICK,
PRINCE EDWARD ISLAND AND THE
NORTH-WEST TERRITORIES,

BY

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ADDENDA.

page 71, footnote (66), for 'Ont. R.' read 'Ont. App'.
page 93, footnote (48), for 'affirming' read 'affirmed'.
page 116, line 22, for 'owing' read 'owning'.
page 131, reference number (118), add the following :—

The difficulty above referred to has been obviated by a statute passed in Manitoba while this work was in press (Stat. Man. 1899, c. 36), exempting conditional sales from the operation of sec. 24 (2), of the Sales of Goods Act of Manitoba, see Appendix, page 370.

page 133, line 3, for 'section 9' read 'section 10'.
page 141, line 15, for 'bill of lading' read 'bill of exchange'.
page 174, line 12, for 'terms' read 'term'.
page 179, line 13, for 'conditions' read 'condition'.
page 291, line 6 from foot of page, for '9 months' read 'one year (Stat. Man. 1896, c. 8, s. 2)'.
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CHAPTER I.

CONTRACTS OF CONDITIONAL SALE.

Conditional Sale Defined.—A conditional sale of a chattel is a sale in which the transfer of title to the thing sold, or the purchaser's right to retain the thing sold, is made dependent upon the performance of a condition. It is a sale the binding effect of which, notwithstanding delivery of the thing sold, is made to depend on due payment, or other performance, by the buyer, so that meanwhile the title or ownership is not vested in him (1).

Nature of Conditional Sale.—A sale of goods by sample with an agreement that they may be exchanged if inferior, is, in the wider sense of the term, a conditional sale (2). So also is an agreement for the purchase of furniture on the "hire system," whereby the owner of the goods leases them on the terms that they shall become the property of the hirer, when certain instalments have been paid, and reserves the title and property in the goods until that has been done, with liberty to seize them on default of the hirer to pay any instalment (3).

Contracts of conditional sale, when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The intent of the parties will be recognized, and sanctioned, where it is not contrary to the policy of the law.

(1) Century Dict.

(2) *Fisher v. Merwin* 1 Daly N.Y. 234.

(3) *Ex p. Crawcour* 9 Ch. D. 419.

Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent the purpose of the parties from having effect (4).

If the hiring agreement, although it reserves the property in the goods, provides that the hiring shall continue until the whole purchase price is paid in rentals, or otherwise compels the hirer to carry out the purchase, the contract is an "agreement to buy" the goods (5), but if the hirer is empowered to terminate the hiring at any time by delivering up the chattel without being liable for any further payments beyond the sums then due, then the contract is not an agreement to buy (6).

Where M. agreed to manufacture and furnish to the joint account of himself and K. a quantity of staves to be loaded in cars at a railway station by a day named, and by the terms of the agreement the staves were to be considered at all times, whether marked or not, the property of K. as security for advances, it was held that the staves became K.'s property as soon as made, and never were the property of M. nor subject to seizure at the instance of M.'s creditors (7).

And where crude oil was consigned to a refiner on the express agreement that no property in the oil should pass until he made certain payments, and the refiner sold the oil before making such payments and without the knowledge of the true owner, it was held that, although such subsequent purchasers were purchasers for value from the refiner in the belief that he

(4) *Harkness v. Russell* 118 U.S. 663.

(5) *Hull Ropes Co. v. Adams* (1895) 65 L.J. Q.B. 114; *Lee v. Butler* (1893) 2 Q.B. 318; *Thompson v. Veale* 73 L.T. (Eng.) 130.

(6) *Helby v. Matthews* (1895) A.C. 471.

(7) *Kelsey v. Rogers* 32 U.C.C.P. 624.

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was the owner and entitled to sell the oil, the true owner was entitled to recover the price of the oil from them, he having retained the property in the oil, and not having done anything to estop him from maintaining his right of ownership, and the refiner not having been entrusted with the goods to sell or deal with them (8).

Frequently the evidence of the conditional sale is an order signed by the vendee obtained on the solicitation of the vendor's agent, and containing stipulations reserving the right of property to the vendors, with a power to retake possession upon default either in the payment of the price or of certain instalments thereof, or in regard to other provisos calculated to ensure the proper care and protection of the chattel sold.

If the order for the article which is the subject of a proposed conditional sale provides that the same is not binding on the company to which it is addressed and by whose agent it is obtained, until received and ratified by the company, it remains open for the company's acceptance for a reasonable time unless it is withdrawn by the party signing it, and when that reasonable time has elapsed, without any notice of its acceptance having been given to him, the party ordering is entitled to assume that the company do not intend to accept it, and he need not notify it of his withdrawal of same (9).

The seller in a conditional contract of sale under which the buyer was permitted to sell the goods in course of trade and use the proceeds in the purchase of other goods for his stock will, however, acquire no title to the latter goods so purchased (10).

(8) *Forristal v. McDonald* (1883) 9 Can. S.C.R. 12.

(9) *Patterson v. Delorme* (1891) 7 Man. R. 594.

(10) *Baker v. Tolles* (N.H.) 36 Atl. Rep. 551.

But a contract by which one person expressly agrees to pay for all twine shipped to him under the contract by the other party, and make a settlement with the latter no later than a specified date and pay interest on any balance then due, the title to the twine to remain in the seller until paid for, is a conditional and not an absolute sale (11).

But it would seem that a conditional contract to furnish the material for and construct an elevator is one for work done rather than a contract for the conditional sale of goods and chattels (12).

Distinguished from Chattel Mortgage.—In order to ascertain whether an agreement is such an assurance of chattels as comes within a statute requiring bills of sale and chattel mortgages to be filed of record, the court may go outside the form of the document and enquire into the circumstances to see whether or not the document represents the real transaction between the parties (13).

So where a money lender takes an absolute transfer of certain goods and immediately lets the goods, by an agreement of hiring and conditional sale, to the borrowers from whom he had obtained the transfer, the transaction may be considered as an agreement of loan upon the security of the goods (14).

And where the owner of certain furniture desired to raise a loan upon same without the publicity of the

(11) *Osborne v. Plano Mfg. Co.* (Neb.) 70 N.W. Rep. 1124.

(12) *Graves Elevator Co. v. Callanan* 11 App. Div. (N.Y.) 301, 42 N.Y. Supp. 930.

(13) *Re Watson* 25 Q.B.D. 27.

(14) *Russell on Hire Purchase* 17; *Hooper v. Ker* 76 L.T. (Eng.) 307; *Phillips v. Gibbons* 5 W.R. 527; *Ex p. Odell* 10 Ch. D. 76; *French v. Bombernard* 65 L.T. (Eng.) 49; *Jones v. Tower Furnishing Co.*, 6 Morrell Bank. R. 193.

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Co. (1891)

registration of a bill of sale, and the lender or person from whom the money was obtained went through the form of purchasing the furniture and taking delivery thereof, and on the same day let the furniture to the other at an advanced price upon an agreement of hire and conditional sale, it was held that the transaction was in fact one of loan, and not a sale with a right of repurchase, and that the contract was, consequently, to be considered either as a bill of sale by way of mortgage, or as a license to take possession of chattels as security for a debt (15).

But if there are in fact two bona fide and separate and distinct transactions, one of absolute sale of the goods and the other of hiring and conditional sale, the transaction is valid in that form (16). And it will make no difference that the goods were sold on the terms that the seller should repurchase it on the "hire system"; for a contract of sale, coupled with an option of purchase, differs entirely from a mortgage (17).

The real nature of the transaction may be enquired into by oral evidence, beyond the mere hiring agreement, and if it be shewn that the latter is merely a device for giving security for a loan in a manner to evade a statute requiring registration of bills of sale and other transfers by way of security, the written hiring agreement will be treated as being in law such a bill of sale or transfer for the purposes of the statute, and as void for non-compliance therewith (18).

Stipulation for Lien.—An agreement for the sale of certain machinery and other goods, contained a

(15) *Re Watson* 25 Q.B.D. 27.

(16) *Ex p. Shane* 29 Sol. Jour. 70.

(17) *North Central v. Manchester* 13 A. C. 554, 567.

(18) *Madell v. Thomas* (1891) 1 Q.B. 230; *Beckett v. Tower Assets Co.* (1891) 1 Q.B. 638 (C.A.)

provision that, until the balance of the purchase money should be fully paid, the vendor should have a "vendor's lien" on the goods for such balance, and that no actual delivery of such property should be made, nor should possession be parted with, until such balance and interest should be fully paid. After the sale the vendee took possession of the goods, and subsequently, with the assent of the vendor, who surrendered a former lease, the defendants leased to the vendee the premises upon which the goods were situated. Afterwards, and while the balance of the purchase money was still unpaid, the defendants distrained for rent upon the goods in question. It was held, that the transaction in question amounted to an executory agreement to sell the chattels mentioned, the transfer of property in them being conditional upon payment of the price; that the retention of possession by the vendor was intended as security for the payment of the price, and that being the case, the stipulation that there should be a "vendor's lien" for the price should be read out of the contract as mere surplusage, because with the retention of possession provided for, there was no reason for the existence of the lien; and that only the interest of the tenant in the goods could be distrained on (19).

And where a note given for the purchase of machinery provided that it should be a "lien" upon the machinery until paid in full at maturity, at which time the property should, on default, be at the disposal of the vendors, the transaction was held to be a mortgage, and not a conditional sale, the reservation of the lien being inconsistent with the retention of the title by the vendors (20).

(19) *Carroll v. Beard* 27 Ont. R. 349.

(20) *Frick v. Hilliard* 95 N. Car. 117.

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Hire-Purchase Contracts.—Where a contract is made, under which chattels are hired at a rental payable in instalments, but with the proviso that the hirer shall become the owner on paying rental instalments totalling the price agreed upon for the goods, and that, until all the instalments are paid, the property in the chattels shall remain in the person from whom they are hired, such an agreement is effectual to prevent the hirer from acquiring any title or property in the chattels by virtue of payments made amounting to less than the sum agreed upon (21).

The Bailment. The bailment is the delivery of the property intended to be sold by the vendor to the vendee, and is complete when the property is so delivered. The receipt note is simply the written evidence or statement of the conditions on which the bailment was made, or is intended to be made; and although the right to possession, as well as the title, is by its terms retained and reserved to the conditional vendor, there is a bailment if the vendee receives the actual visible possession (22).

Contract to be in Writing.—By statute in British Columbia, the bailment, or conditional purchase of chattels, made upon a condition under which the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase money, must be 'evidenced' in writing, or it will be invalid to reserve the bailor's right of property as against subsequent purchasers or mortgagees from the bailee acquiring the same without notice of the bailor's title, and in good faith for valuable consideration; and such writing must have been

(21) *Re Robertson* 9 Ch. D. 419.

(22) *Western Milling Co. v. Darke* (1894) 2 N.W.T. Rep. 34, 46.

signed by the bailee or conditional purchaser, or his agent (23).

And a copy of the receipt-note, hire receipt, order or other instrument providing for a conditional sale, must be left with the bailee by the bailor, at the time of the execution of the instrument or within 20 days thereafter (24).

In Manitoba a bailment of "manufactured goods or chattels," where the condition of the bailment is such that the possession of the chattel should pass without any ownership being acquired by the bailee, is invalid unless it is evidenced in writing, signed by the person so obtaining possession of the chattel (25).

A New Brunswick statute makes a similar provision in regard to bailments of manufactured goods, upon conditional sales in that Province (26), and it further provides, in terms identical with the British Columbia Act, that the bailor shall leave with the bailee a copy of the instrument by which a lien on the chattel is retained, or which provides for a conditional sale, either at the time of the execution of the instrument, or within 20 days thereafter (27).

In the North-West Territories if it be a condition of the bailment that the right of property or right of possession, in whole or in part, shall remain in the bailor, notwithstanding that the actual possession of the goods passes to the bailee, but it is intended that the property in the goods shall eventually pass to the bailee on payment of purchase money in whole or in part, or on the performance of some condition by the

(23) R.S.B.C. 1897, c. 169, s. 25.

(24) R.S.B.C. 1897, c. 169, s. 31.

(25) R.S.M. 1891, c. 87, s. 2.

(26) Stat. N.B. 1899, c. 12, s. 1; see Appendix.

(27) Stat. N.B. 1899, c. 12, s. 4.

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bailee, the bailor will not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee in good faith for valuable consideration from the bailee, or as against judgments, executions or attachments against the bailee, unless the 'bailment with such agreement, proviso or condition' is in writing signed by the bailee or his agent; but this enactment applies only where the sale or bailment is of goods of the value of \$15 and upwards (28). The North-West Territories' Ordinance also requires that the writing shall contain such a description of the goods that the same may be readily and easily known and distinguished.

In Nova Scotia every hiring, lease or bargain for the sale of personal chattels, accompanied by an immediate delivery and followed by an actual and continued change of possession, whereby it is agreed that the property in the chattel, or in case of a bargain for a sale of same a lien thereon for the price or any part thereof, shall remain in the person letting to hire, the lessor or bargainor, until the payment in full of the hire, rental or price agreed upon by future payments or otherwise, shall be by instrument in writing and be signed by the *parties* thereto, or by their agents duly authorized, in writing (29).

In that Province it is therefore necessary that the writing be signed both by the bailor and the bailee. If signed by an agent on behalf of either, a copy of his written authority must be attached to the instrument. The instrument must also set forth fully, by recital or otherwise, (a) the terms, nature, and effect of such hiring, lease or bargain for sale, (b) the property or lien remaining in the person letting to hire,

(28) Con. Ordinances N.W.T., 1898, c. 44, s. 1.

(29) Acts of N.S. 1899, c. 28, s. 8.

(c) the lessor or bargainor, and (d) the amount payable thereunder, whether expressed as hire, rent, price or otherwise (30).

In Ontario, and also in Prince Edward Island, a bailment of "manufactured goods or chattels", other than household furniture, made upon a condition under which the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof, must be evidenced in writing, signed by the bailee or his agent; otherwise it will be invalid as against subsequent purchasers, or mortgagees from the bailee acquiring the chattel for valuable consideration, and in good faith, without notice of the bailor's claim thereto (31).

The bailor must also leave with the bailee, at the time of the execution of the instrument, or within twenty days thereafter, a copy of the same (32).

Exception of Household Furniture.—Pianos, organs, or other musical instruments, are not exempt from the Conditional Sales Acts of Ontario and Prince Edward Island. The Ontario Statute makes an exception of household furniture "other than pianos, organs, or other musical instruments", while the Prince Edward Island statute enacts that such are not included in the terms "household furniture" (33).

The term "household furniture" is restricted in meaning to such articles of furniture and ornaments as are necessary for, and are provided for the occupation of, and living in the house, according to the condition

(30) Acts of N.S. 1899, c.28, s. 8.

(31) R.S.O. 1897, c. 149, s. 1 and 2; Stat. P.E.I. 1896, c. 6, s. 1 and 6.

(32) R.S.O. 1897, c. 149, s. 5; Stat. P.E.I. 1896, c. 6, s. 8.

(33) R.S.O. 1897, c. 149, s. 2; Stat. P.E.I. 1896, c. 6, s. 6.

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and means of the occupants and articles *ejusdem generis*, and does not include a sewing machine or a library, scientific instruments, billiard table, lawn tennis set, guns, fishing gear, or the like (34); but ranges and heaters are held to be exempt under an exception of "household goods" (35).

Time of Signature by Bailee.—If a lien, note, or agreement, purporting to reserve title, is obtained from the vendee after a bargain of absolute sale, and as a means of securing the payment of the price or a part thereof, it is subject to the statutes relating to registration of bills of sale and chattel mortgages, and registration under the Conditional Sales Act would not protect the vendor, the title having already passed to the vendee, on the bargain of absolute sale (36). To transfer such title back again to the vendor there must be either an actual delivery up of possession to him, or the making and registration of a bill of sale, otherwise the transaction would be voidable at the instance of execution creditors, or purchasers for value, under the Bills of Sale Act. So where a chattel was sold and delivered between the parties, and some seven months after such delivery a lien note was signed by the vendee for a balance due the vendor on the transaction, it was held that the lien note was invalid, as to third parties acquiring the chattel (37).

Reservation of Property.—The construction of a document evidencing a conditional sale, is for the court, and not for the jury (38).

(34) *Allen v. Wallace* (1888) 21 N.S.R. 49, 53.

(35) *Kerby v. Clapp*, 15 App. Div. (N.Y.) 37; 44 N.Y. Supp. 116.

(36) *Mason v. Bickle* (1878) 2 Ont. App. 291, 296.

(37) *Gallant v. Mellett* (1898), 18 C.L.T. 199.

(38) *Nordheimer v. Robinson*, 2 Ont. App. 305.

In *Polson v. Degeer* (39) the contract was in the following form :

TORONTO, (date).

To Wm. Polson & Co., Toronto :

" Please ship to my address as soon as possible from Toronto the following machines as per prices agreed upon (here followed an enumeration of the articles with the prices of each). Terms, \$225 to be allowed for my portable engine and boiler C. O. B. at Sunderland, and \$635 to be paid at the time of shipment.

" And I hereby agree that if this machinery is not settled for by cash and notes according to the above terms of sale, within twenty days after date of shipment, then the whole amount shall become due; and I further agree not to countermand this order, and until payment in full of the purchase money, this machinery shall be at my risk, and I will insure in your favor for an amount sufficient at all times to cover your interest therein, and on demand will assign and deliver to you the policy of insurance, and the title thereof shall not pass from you; and I will not sell or remove any of this machinery from my premises without your consent in writing so to do; and in case of default of any of the payments or provisions of this order, you are at liberty, without process of law, to enter upon my premises and take down and remove the said machinery; and I hereby agree to deliver the said machinery to you in like good order and condition as received (subject to ordinary wear and tear); and I hereby waive all claims for damages, and will pay the expenses of such removal, and I hereby declare that the foregoing embodies all the agreements made between us in writing, and that any note or notes, or other security given by me to you for this indebtedness shall be collateral thereto."

It was held that, although from the confused arrangement of the stipulation in the order there was room for contention that the word "title" applied to the policy of insurance and not to the machinery, that the document should be interpreted by all its parts, and that by the whole tenor of the instrument the word title was referable to the machinery, and that the property therein was effectually reserved to the vendor till paid for (40).

(39) *Polson v. Degeer* (1886) 12 Ont. R. 275.

(40) *Polson v. Degeer* (1886) 12 Ont. R. 275, 280.

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In a recent New Brunswick case the only evidence of a reservation of property was a clause printed across the stub end of a draft as follows :

" The express conditions of sale and purchase of the vehicles for which the draft is given, is such that the title, ownership, or right of possession, does not pass from the said ——— Co. until this draft and interest is paid in full."

The vendors, who were carriage manufacturers at Montreal, had shipped to the vendee in New Brunswick two wagons, and drew on him for the price, the draft form having thereon the words mentioned ; the vendee accepted the draft in that form, but resold one of the wagons to a bona fide purchaser without notice of the want of title, and afterwards died, and there was no evidence that the reservation of title was a part of the original arrangement between the vendor and vendee, or that the latter's attention had been called to the special printed clause on the draft when he accepted it (41). The Supreme Court of New Brunswick held that the evidence of title in the vendors was insufficient, and that to recover against an innocent purchaser for value strict proof is required, the onus of which is upon the vendor, where the sale is by a manufacturer to a dealer, and is to all appearances a transaction in the ordinary course of business.

Fixtures to Realty.—Articles not otherwise attached to the land than by their own weight, are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, and the onus of shewing that they were so intended is on those who assert that they have ceased to be chattels (42).

(41) *Purtle v. Heney* (1896) 33 N.B.R. 607.

(42) *Canada Permanent v. Merchants Bank*, 3 Man. R. 285.

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures with a view to ascertaining whether or not they thereby become fixtures incorporated with the freehold (43).

In the absence of evidence of a contrary intention, machines affixed to the freehold merely for the purpose of steadying them, and used for the purpose of a manufacturing business for which the freehold is occupied, become part of the freehold even though the mode of affixing them is such that they can easily be detached without injury to the machines or to the freehold; but similar pieces of machines standing on the freehold, but not affixed except by belting for motive power, retain the character of chattels notwithstanding that the work done by them is an essential process in the manufacture to which the freehold is devoted (44).

But a fastening by cleats affixed to the building only and not affixed to the machine except by being placed close against it, is not an affixing of the machine at all, and is not sufficient in itself to make the machine a part of the realty (45).

A statute passed in Ontario in 1897, and now consolidated with the Ontario Conditional Sales Act, R.S.O., 1897, c. 149, enacts, as to that province, that where any *goods or chattels subject* to the provisions of the Conditional Sales Act are affixed to any realty without the *consent in writing* of the owner of the goods or chattels, such goods and chattels shall not-

(43) *Haggart v. Town of Brampton* (1898) 28 S.C.R. 174.

(44) *Longbottom v. Berry* L.R. 5 Q.B. 123; *Sun Life v. Taylor* (1893) 9 Man. R. 89; *Keefer v. Merrill* 6 Ont. App. 132 discussed.

(45) *Sun Life v. Taylor* (1893) 9 Man. R. 89, 101; *Crawford v. Findlay* 18 Gr. 51.

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withstanding "remain so subject"; but the owner of such realty, or any purchaser, or any mortgagee or other incumbrancer on such realty, shall have the right, as against the manufacturer, bailor or vendor of such goods or chattels, or any person claiming through or under them to retain the goods and chattels upon payment of the amount due and owing thereon. It is only by reference to the latter part of the enactment that it is made to appear that the rights of the owner of the realty are intended to be affected. The Act is, except as to this added section, one for the protection of persons other than the bailor as against his claim, and does not enlarge his rights, and for the statute to simply make chattels affixed to the realty still subject to its provisions would not, it is submitted, have the effect of preserving to the bailor a property in them of which he had deprived himself by a consent, whether written or verbal, and whether indicated by his conduct or otherwise. The context, however, seems to indicate that the intention of the Legislature was that the chattel so annexed should remain subject to the claim of the conditional vendor, unless the latter has waived the same in writing. The clause is retroactive, and applies as well to transactions before it was passed (1897) as to transactions thereafter.

By a statute passed in New Brunswick in 1899, 62 Vict., N.B., c. 114, it was enacted that where any goods or chattels have been sold or bailed under any receipt note, hire receipt or other instrument by which it is agreed that no ownership therein shall be acquired by the purchaser or bailee until the payment of the purchase or consideration money, or some stipulated part thereof, and such goods or chattels are affixed to any realty without the *consent in writing* of the owner of the goods or chattels, such goods and chattels shall not be or become part of the realty, but shall continue

to be and remain personal property ; and the rights of the owner thereof are declared not to be in any way altered or affected by such goods or chattels being so affixed to the realty, except that the owner of the realty, or mortgagee, or other incumbrancer of the realty or a purchaser of the same is given the right to retain the chattel as against the manufacturer, bailor or vendor, and as against any person claiming through or under him, upon payment of the amount due and owing thereon. The enactment is retroactive, and applies to past as well as to future transactions, and excepts only from its operation litigation pending at the time it was passed (April 28, 1899).

Fixtures in Quebec.—If, the vendor himself affixes, or becomes a party to the affixing of the chattel to the freehold, the chattel will become an immovable by destination, and an attempted reservation of title thereof, or a license to remove the same, will not be effectual as against a third party entitled to the realty.

In *Leonard v. Boisvert* (58), the facts were as follows :—B., the defendant, was the owner of a mill, and sold the same in 1891, with right of redemption (*reméré*) to one Desmarais. A few days after the sale B. ordered from the plaintiff an engine and boiler to be built, and they were delivered to him and placed in the mill, at the beginning of November. Time was given for payment, and it was agreed that B. should give notes indorsed by his brother for the price. The contract contained this clause :

"It is distinctly understood and agreed that the property in the goods so to be furnished by you (Leonard) to me (Boisvert) is not to pass to me until you are fully paid the price for same, and that the notes so to be given are to be held by you as collateral security in respect of such purchase money. If default be made in the payment of said notes, or if the said goods are attempted

(58) *Leonard v. Boisvert* (1897) 10 Que. S.C. 343.

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"to be disposed of by me, or are seized in execution in respect of any debt due by me, then you are at liberty to take possession of the goods, and resell the same by public auction or private sale, crediting me with the proceeds only, less all expenses."

B., notwithstanding the sale *a réméré*, remained in possession of the mill, as well as of the engine and boiler, until June, 1893, when he left the country. Desmarais then took possession and sold the whole to Mme. Hamel, who resold it to the defendant P., from whom the plaintiff caused to be seized by *saisie-revendication* the engine and boiler on Nov. 26th, 1894. It was held that the contract in question was not a sale with a suspensive condition as to the transfer of property, but a sale pure and simple, which had transferred to B. the property in the engine and boiler; that the stipulation that the plaintiff should have a right to take back the things sold in case of non-payment had, at most, only the effect of giving him a personal right against B. to take them back with legal proceedings, but did not subordinate the transfer of the right of property to the payment of the whole price of sale. In placing the engine and boiler in the mill, B. had made them immovable by destination and they passed to the defendant P. by the sale of the mill. B. had a sufficient interest in the mill, in spite of the sale *a réméré* which he had made, to immobilize by destination the engine and boiler, and though his interest was gone he would still be deemed to have placed them in the mill on account of the owner, and the immobilization, therefore, would be valid (59).

Lien Note—Negotiability.—The Canadian Bills of Exchange Act, 1890, defines a promissory note as "an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a fixed or determinable

(59) *Leonard v. Boisvert* (1897) 10 Que. S.C. 343.

- "future time a sum certain, in money, to or to the order of a specified person or to bearer" (46).

An instrument in the form of a promissory note given for part of the price of an article, with the added condition "that the title and right to the possession of the property for which this note is given shall remain in the payees until this note is paid," is not a promissory note or negotiable instrument, and a transferee takes it subject to any defence available between the original parties; for such a condition imports that unless the maker gets the property with a good title at the date of maturity, he could not be required to pay (47).

The Bills of Exchange Act contains a special provision (sub-section 3 of section 82) that a note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

In a recent Manitoba case the instruments sued on contained the usual provisions of a promissory note with additional provisions to the effect that the title, ownership and property for which they were given should not pass from the payees until payment in full, that if the notes were not paid at maturity the vendors might take possession of the machinery for which they were given and sell the same at public or private sale, the proceeds, less the expenses, to be applied on the notes, and that such action should be without prejudice to the right of the vendors to forthwith collect the balance remaining unpaid. The Court of Queen's Bench of that Province held that the instruments could not be regarded as negotiable promissory notes because, firstly, the added provisions qualified the absolute and

(46) (1890) 53 Vic. (Can.) c. 33, s. 82.

(47) *Dominion Bank v. Wiggins* (1894) 21 Ont. App. 275.

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(48) *Bank of Montreal v. Bank of Commerce*

(49) *Dominion Bank v. Wiggins*

(50) *Watson v. Watson*

(51) *Stanley v. Stanley*

unconditional promises to pay, as the vendors might not be in a position to give title to the property at maturity which the makers would be entitled to, and, secondly, the added provisions were matters entirely unwarranted by sub-sec. 3 of sec. 82 of the Bills of Exchange Act (Can.), 1890, as they could in no sense be treated as merely a pledge of collateral security with authority to sell or dispose thereof (48).

But the negotiability of a promissory note given on a conditional sale of goods will, however, not be affected by clauses under which the time of payment is accelerated in certain events, as on the maker selling his real estate, or preparing to leave the Province (49).

Statute of Limitations—Acknowledgment of Indebtedness.—The liability for the purchase price on a conditional sale will be kept good as against the statute of limitations, if the conditional vendee, or his duly authorized agent signs a writing, either containing an express promise to pay the debt, or being in such terms that an unconditional promise to pay is necessarily to be implied (50).

The acknowledgment must be absolute and unconditional, and one from which the promise to pay the debt can be inferred, and must be made to some one entitled to receive payment of the debt, and to whom a promise to pay could be presumed (51).

Promissory notes for \$75 each were given by a conditional vendee of a machine to the vendors, The Watson Manufacturing Co., and were endorsed by them to a corporation named The John Watson Manu-

(48) *Bank of Hamilton v. Gillies* (1899) 35 C.L.J. 468; *Merchants Bank v. Dunlop* 9 Man. R. 623, not followed.

(49) *Dominion Bank v. Wiggins* (1894) 21 Ont. App. 275.

(50) *Watson v. Sample* (1899) 12 Man. R. 375; 9 Geo. IV. (Imp.) c. 14.

(51) *Stamford Banking Co. v. Smith* (1892) 1 Q.B. 765.

facturing Co., Limited. On instructions from the latter, a collection agent demanded payment from the conditional vendee of an account claimed as due the "Watson Manufacturing Co.," made up of the amount of the two notes so given. The maker of the notes replied that the company had retaken the machine and sold it for \$70 or \$75, and added, "therefore, I cannot see that this is an honest debt; the binder was sold to a good man, and I cannot see that I owe the firm for anything *but the last note and interest on it.*" It was held that this was a sufficient acknowledgment of an indebtedness for the note last due, from which a promise to pay is implied by law (52), and that the corporation, on whose behalf the collection agent was in fact acting, was entitled to the benefit of the acknowledgment (53).

Suspensive Condition—Quebec Law.—An agreement for the sale of machinery on condition that, though delivered to the purchaser, the seller shall retain the ownership until the full price is paid, is a valid agreement under Quebec law, and the right of property is transferred to and vested in the purchaser only upon such payment being made. In order to regain possession the seller must pay back or tender what has been paid on account of the price unless the agreement provides that the same shall be forfeited as damages for non-performance. (54)

In a recent case the facts were as follows:—C. was in possession of a sewing machine of the W. Co. under a sale with a suspensive condition that the company should have a right to take it back on failure by

(52) *Tanner v. Smart* 6 B. & C. 603; *Green v. Humphreys*, 26 Ch. D. 474.

(53) *Watson v. Sample* (1899) 12 Man. R. 375.

(54) *Waterous Engine Works Co. v. Hochelaga Bank* 5 Que. Q.B. 125; Affirmed by Supreme Court of Canada, 27 Can. S.C.R. 406.

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C. to make all the payments. The contract did not give the company the right, in case of revendication, to keep the payments made. C. owed a balance on the price and the company revendicated the machine by *saisie revendication*, but refused to reimburse C. for the payments already made. Because of this refusal C. opposed the seizure; it was held that the company had no right to seize the machine without at the same time tendering to C. the sums which he had paid upon the price of sale, and it was therefore responsible for the violence employed by the bailiff to effect the seizure which under the circumstances was illegal. (55)

Where an article is sold with the condition that it shall remain the property of the vendor until the price shall be fully paid, and the vendor subsequently revendicates the thing sold for non-compliance with the conditions of the contract, such action cannot be maintained unless the plaintiff tenders therewith the money received on account of the price (56).

The return of money, received as part price of an article delivered under a contract of sale with a resolutive condition, is necessary prior to revendicating such article. But if the article, through the fault of the purchaser, has been deteriorated for an amount equal to or in excess of that part of the price already paid, no return of such part price can be demanded or required before or when the revendication of such article is judicially made. The fact that the deterioration of the article reduces its value to a large extent, there being no evidence as to how such article was cared for, raises a presumption of fault on the part of the purchaser according to circumstances (57).

(55) *Cousineau v. The Williams Manufacturing Co.* (1897) 11 Que. S.C. 389.

(56) *Tufts v. Giroux* (1898) 12, Que. S.C. 530.

(57) *Waterous Engine Works Co. v. Cascapedia Pulp & Lumber Co.* (1898) 13 Que. S.C. 315.

CHAPTER II.

CONDITIONAL SALE REGISTRATIONS.

British Columbia.—By statute in this province a true copy of the receipt-note, hire receipt, order, or other instrument evidencing a conditional sale of chattels in British Columbia must be filed not later than 21 days after the delivery of the goods or of the first portion thereof to the conditional purchaser in the proper office for registration of a bill of sale affecting property situate at the place where the conditional purchaser resides (1).

The registration offices for bills of sale are as follows :—

For the County of Victoria, the office of the Registrar of the County Court at Victoria ;

For the County of Nanaimo, the office of the Registrar of the County Court at Nanaimo ;

For the County of Vancouver, the office of the Registrar of the County Court at Vancouver ;

For the County of Westminster, the office of the Registrar of the County Court at New Westminster ;

For the County of Cariboo, the office of the Registrar of the County Court at Clinton ;

For the County of Yale, the office of the Registrar of the County Court at Kamloops ;

For that portion of Kootenay County being the territory covered by the Slocan Riding of West Kootenay Electoral District, the office of the Registrar of the County Court at Kaslo ;

For that portion of Kootenay County being the territory covered by the Nelson Riding of West

(1) R.S.B.C. 1897, c. 169, s. 25.

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Kootenay Electoral District, the office of the Registrar of the County Court at Nelson ;

For that portion of Kootenay County being the territory covered by the Rossland Riding of West Kootenay Electoral District, the office of the Registrar of the County Court at Rossland ;

For that portion of the County of Kootenay being the territory covered by the South Riding of East Kootenay Electoral District, the office of the County Court Registrar at Fort Steele ;

For the remainder of the County of Kootenay, the office of the Registrar of the County Court at Revelstoke (2).

These districts are subject to subdivision or alteration from time to time by the Lieutenant Governor in Council who may provide for registration in a different district or at a different place from any above mentioned (3).

In default of filing as the Act requires, the bailment or conditional purchase will be invalid as against subsequent purchasers or mortgagees of the chattels without notice in good faith for valuable consideration. The statute further declares that in the event of any variance between the original document and the copy which has been filed the copy filed shall prevail (4). This, however, can hardly have been intended to apply as between the parties to the contract and may be limited in its operation so as to apply only at the instance and for the benefit of persons coming within the class for whose protection the filing is intended, *i.e.* subsequent purchasers or mortgagees without notice in good faith for valuable consideration.

(2) Stat. B.C. (1899) 62 Vict., c. 7, s. 2.

(3) 62 Vict. (B.C.) 1899, c. 7, s. 2.

(4) R.S.B.C. 1897, c. 169, s. 30.

Manitoba.— In this province there is no provision for registering conditional sale contracts; but in the case of "manufactured" goods or chattels the receipt-note, hire receipt or order given by the bailee, where the condition of bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee, will be invalid unless such goods or chattels have the manufacturer's name or some other distinguishing name, painted, printed or stamped thereon or otherwise plainly attached thereto at the time the bailment is entered into; and the bailment itself will be invalid unless evidenced by a writing signed by the bailee (5). But the manufacturer and his agents are by statute required to furnish forthwith on application to any applicant full information respecting the balance due on any manufactured goods or chattels coming within the Lien Notes Act (Man.) and the terms of payment of such balance (6). And any manufacturer or agent refusing or neglecting to furnish such information when asked for is liable to a fine of not less than \$10 nor more than \$50 on conviction before a justice of the peace (7).

These statutory provisions are such as to constitute the manufacturer in one sense a registrar of conditional sale contracts made by himself and coming within the limitations of the Lien Notes Act, for he is bound to furnish, without remuneration, the information mentioned in the Act to *any* applicant forthwith on application. The words, "full information respecting the balance due" and "the terms of payment of such balance," would seem in this connection to include a statement as to whether or not the right of property in

(5) The Lien Notes Act (Man.), R.S.M. 1891, c. 87, s. 2.

(6) R.S.M. 1891, c. 87, s. 3.

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the chattel was in fact reserved and in what form, so that the enquirer may be enabled to judge for himself whether or not the property has passed and whether the balance claimed by the manufacturer is or is not effectually made a charge upon the chattel itself.

It would seem that the manufacturer, if himself the vendor, will be protected if he affixes some "distinguishing" name other than his own. A "distinguishing" name would include the name of the retailer or agent through whom the goods are sold, and of whom enquiry could be made as to the title thereto. And although the manufacturer has been paid for the chattel, it is submitted that the purchaser from him or any subsequent owner selling upon a conditional sale need do no more than see that the manufacturer's name or some other distinguishing name is on the chattel. If the manufacturer's name remains on the article, any intending purchaser may from enquiry from him trace the title, the object of the statute being to furnish a means of information distinct from the person holding possession of the chattel. If the manufacturer's name is not affixed to it and it is being sold by a person other than the manufacturer upon a conditional sale contract, such person may, of course, affix his own name as a "distinguishing" name in compliance with the Act.

New Brunswick.—In this province the statute as to registration of conditional sale contracts follows closely that of Ontario, and only "manufactured" goods and chattels are within its provisions. Mere default in registering operates only in aid of subsequent purchasers or mortgagees (8) and cannot be taken advantage of by execution creditors; but any creditor of the

(8) Stat. N.B. 1899, c. 12, s. 1.

bailee or other interested person may compel the filing by the bailor of a sworn statement of the amount remaining due on the order.

The manufacturer or bailor instead of registering the contract has the alternative of having his name and address printed, painted, stamped or engraved on the chattel or otherwise plainly attached thereto, at the time possession is given to the bailee (9).

If the manufacturer's name and address is not placed on the article a copy of the writing evidencing the bailment must be filed with the Registrar of Deeds of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase. The time limited for filing is 10 days from the execution of the receipt-note, hire-receipt, order or other instrument evidencing the bailment or conditional sale given to secure the purchase money or a part thereof (10).

Provision is made that a clerical error which does not dislead or an error in an immaterial or non-essential part of the copy filed shall not invalidate the filing (11).

The manufacturer, bailor or vendor is also bound, if a "creditor or interested person" demands the same, to file with the Registrar within 20 days from the making of the demand, a sworn statement of the amount due on any receipt-note, hire receipt, or order given upon a conditional sale of a chattel; and on his failure to do so all rights accruing so him under the receipt-note, etc., will be forfeited as against the creditor or interested person making the demand (12).

It would seem that the filing of the sworn statement

(9) Stat. N.B. 1899, c. 12, s. 1.

(10) Stat. N.B. 1899, c. 12, s. 2.

(11) Stat. N.B. 1899, c. 12, s. 3.

(12) Stat. N.B. 1899, c. 12, s. 5.

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in answer to a demand is compulsory in all three classes of cases :

(a) Where the vendor's name is stamped upon the chattel in lieu of registering ;

(b) Where the receipt-note, etc., is filed ; and

(c) Where the name is not affixed and the receipt-note is not filed.

It may be doubted whether the words "rights accruing under" the receipt-note, etc., include the right of property *retained* or reserved in the contract. The right of property upon a conditional sale does not pass to the conditional vendee at all, even momentarily ; and it does not, therefore, in the strictest sense of the word accrue under, or arise from, the receipt-note. The right of property accrued when the vendor bought the chattel, and the reservation of that right in the receipt-note is merely for the purpose of evidencing the fact that he has not parted with such right. An example of a right "accruing" under the receipt-note or order is the license usually granted by the bailee to the bailor to enter upon the bailee's premises in case of default for the purpose of removing the chattel. But a perusal of the whole statute seems to make it plain that in this connection the word "accruing" should have a wider meaning and will include the right of property reserved, and that the "rights accruing" which will be forfeited for non-compliance with its provisions are the rights accruing to the *bailor*, although the statute omits to state it explicitly.

North West Territories.—In the Territories a writing signed by the bailee or his agent and containing such a description of the goods, the subject of the bailment, that the same may be readily and easily distinguished, is required in order to effectually reserve to the bailor any right of property or right of possession

reserved upon a conditional sale of goods *of the value* of \$15 or over, as against a purchaser or mortgagee from the bailee in good faith for valuable consideration, or as against judgments, executions or attachments against the bailee (13). And the writing or a true copy thereof must be registered in the office of the Registration Clerk for chattel mortgages in the district within which the conditional purchaser resides, verified by the affidavit of the seller or bailor or his agent stating that the writing or copy truly sets forth the agreement between the parties and that the agreement therein set forth is bona fide and not to protect the goods in question against the creditors of the buyer or bailee (14). The registration must be effected within 30 days of the sale or bailment, and if the goods are delivered in another registration district than that within which the buyer resides or if they are removed to another registration district then the writing or a true copy accompanied by the bailor's affidavit must be registered *also* in the registration district in which the delivery of the goods takes place or into which they are removed as the case may be. Such additional registration must be made within 30 days of such delivery or removal (15).

Nova Scotia.—In the Province of Nova Scotia conditional sale agreements must be in writing and must be filed in the registry of deeds for the registration district in which the personal chattels are at the time the instrument is executed, together with an affidavit of either the bailor or the bailee.

The new Act of 1899 is based upon section 3 of

(13) Con. Ord. N.W.T. 1898, c. 44, s. 1.

(14) Con. Ord. N.W.T. 1898, c. 44, s. 2.

(15) Con. Ord. N.W.T. 1898, c. 44, s. 2.

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the Revised Act "for the prevention of frauds on Creditors by secret bills of sale" (16) as amended in 1886 and 1893 (17), but in a form since considerably changed. The Bills of Sale Act 1899 (18) applies to all hirings, leases or bargains for selling personal chattels whereby it is agreed—

(a) that the property in the personal chattels, or

(b) in case of a bargain for sale, a lien thereon for the price thereof or any portion thereof shall remain in the person letting to hire, the lessor or bargainor until the payment in full of the hire, rental or price agreed upon by future payments or otherwise, if the hiring, lease or bargain is accompanied by an immediate delivery and is followed by an actual and continued change of possession (19). The instrument must set forth fully by recital or otherwise, the terms, nature and effect of the bargain and the 'property or lien' remaining in the bargainor and the amount payable thereunder, whether expressed as hire, rent, price or otherwise (20). The section does not apply to a simple bargain for hiring under which the lessee in no event can obtain the property and ownership of the chattels hired, as the statute implies that the hiring referred to is one in which the right of property is reserved only until the payment in full of the hire or rental (21). And the statute does not apply if the hire agreement instead of stipulating for a right of the hirer to become the owner of the particular chattel hired, provides that on completion of the payments mentioned in the con

(16) R.S. N.S. 5th series 1884, c. 92.

(17) N.S. Laws 1886, c. 32, s. 1; N.S. Laws 1893, c. 40, s. 1.

(18) N.S. Laws 1899, c. 28, in force only from date of proclamation in the *Royal Gazette*.

(19) N.S. Laws 1889, c. 28, s. 8 (1).

(20) N.S. Laws 1899, c. 28, s. 8 (2).

(21) *Lewis v. Denton*, 19 N.S. R. 235.

tract, the hirer shall receive a chattel of the same kind equal in value thereto (22). The conditional sale contract must be signed by both the bargainor and the bargainee, and if executed by an agent on behalf of either of them the agent's authority must be in writing and a copy attached to the contract (23).

In order to complete the security by having the contract filed in the land registry, it must be 'accompanied' by the affidavit of *either* of the parties thereto, stating:

(a) That such instrument sets for the terms, nature and effect of such hiring, lease or bargain for sale, and the property or lien remaining in the person letting to hire, the lessor or bargainor, and the amount payable thereunder;

(b) that such instrument is executed in good faith and for the express purpose of securing to the person letting to hire, the lessor, or the bargainor the payment at the time and under the terms set out in the instrument, of the amount payable thereunder (24).

The form of the affidavit should be in strict compliance with the statute, and the language of the affidavit should follow the language of the statute (25).

The affidavit of an agent or attorney of one of the contracting parties is proper only in case the contract itself was signed by such agent for his principal, and in case a copy of the agent's written authority to do so is attached thereto; and then the affidavit must also include a statement that the agent or attorney making the same "has a personal knowledge of the matters

(22) *Guest v. Diack*, (1897) 33 C.L.J. 497.

(23) N.S. Laws 1899, c. 28, s. 8.

(24) N.S. Laws 1899, c. 28, s. 8 (3).

(25) *Reid v. Creighton*, 24 Can. S.C.R. 69, 31 C.L.J. 274; *Thomas v. Kelly*, 13 App. Cas. 506.

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deposed to" (26). The expression "personal chattels" is declared by the Act to mean goods, furniture, fixtures and other articles capable of complete transfer by delivery, and shall not include chattel interests in real estate, nor shares nor interests in the stock, funds or securities of any government, nor in the capital or property of any incorporated or joint stock company, nor choses in action (27); and in this connection the term "fixtures" refers only to such articles as are not made a permanent portion of the land, and of which delivery may be made as chattels without the commission of a tortious act to separate them from the freehold (28). The words "accompanied by an immediate delivery and followed by an actual and continued change of possession" which are here applied to the hiring, lease or bargain for the sale of personal chattels, are also used in the Ontario Chattel Mortgage Act in respect of mortgages and sales of chattels, but under the last mentioned statute, registration is required in the correlative case of a sale or mortgage *not* accompanied by an immediate delivery and followed by an actual and continued change of possession (29). The term has had a statutory definition in Ontario since 1894 so far as relates to bills of sale and chattel mortgages, *i.e.* such change of possession as is open and reasonably sufficient to afford public notice thereof (30), a definition which is wider than the interpretation which was theretofore given to it. But a reference to the prior decisions under that statute will be of value in determining the exact meaning and limitations of

(26) N.S. Laws 1899, c. 28, s. 11 (2).

(27) N.S. Laws 1899, c. 28, s. 2.

(28) *Warner v. Don*, 26 Can. S.C.R. 388.

(29) R.S.O. 1897, c. 148, s. 2 and 6.

(30) R.S.O. 1897, c. 148, s. 39.

the phraseology used in the Nova Scotia Act. The underlying principle of both statutes is the same, *i.e.* that where the owner of chattels places another person in possession of the same and allows the latter to use them as his own to all appearances, the person so entrusted will be considered the owner thereof so far as is necessary for the protection of his creditors, or of purchasers or mortgagees of the article from him, unless the real owner gives notice of his claim in such a manner that the prospective creditor or mortgagee may ascertain the particulars of it by searching the public records. In order to determine whether or not the delivery is an 'immediate' one and whether the change of possession is 'actual and continued' within the meaning of the statute the nature of the goods and their locality and the kind of delivery of which they are capable are to be considered (31). The actual change of possession need not be a transfer of possession to the condition vendee in person, nor to his agent acting for him in the negotiation of the conditional sale, but may be to a bailee or carrier for such vendee (32).

A sale of household furniture by a married woman to her husband residing with her in the house in which the furniture was situate and in use, was held to be a sale not accompanied by an actual and continued change of possession (33); and it would therefore seem that a *conditional* sale under like circumstances would not be within the Nova Scotia Act, and would be valid without registration, and it would not even be necessary that it should be evidenced in writing. There is an

(31) *McMaster v. Garland*, 8 Ont. App. 1.

(32) *McMaster v. Garland*, 31 U.C.C.P. 329, 8 Ont. App. 1; *McPartland v. Read*, 11 Allen (Mass.) 231; *Wheeler v. Nicols*, 32 Me. 233.

(33) *Hogaboom v. Graydon*, 26 Ont. R. 298, 31 C.L.J. 100.

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actual and continued change of possession on a sale of goods in a shop if the parties check over the goods, and the vendor delivers the key to the buyer and the goods are kept locked up in the building, and it is not necessary that the goods should be removed or that the buyer should remain in physical possession by himself or someone on his behalf (34). There must be something more than a symbolical delivery or its equivalent, and a marking of the goods with the transferee's mark will not constitute it (35); and if the goods are separated from other goods of the same kind on the vendor's premises, and marked with the purchaser's mark the change of possession is not actual or continued so long as the vendor remains in possession of the premises (36).

If the statutory requirement as to filing be not complied with, the agreement that the property in the goods or that a lien thereon shall remain in the bailor or bargainor becomes null and void by virtue of the statute as against

(a) The creditors of the hirer, lessee, or bargainee (37);

(b) Bona fide purchasers from the hirer, lessee, or bargainee (38);

(c) Mortgagees of the hirer, lessee or bargainee (39).

The operation of the statute is upon the validity of the contract rather than upon the remedy for its

(34) *Kerr v. Can. Bk. of Commerce*, 4 Ont. R. 652; *McMartin v. Moore*, 57 U.C.C.P. 397.

(35) *Short v. Ruttan*, 12 U.C.R. 79.

(36) *Doyle v. Lasher*, 16 U.C.C.P. 263.

(37) N.S. Laws 1899, c. 28, s. 8 (4).

(38) Secs. 2 and 8 (4).

(39) Sec. 8 (4).

enforcement, and it will therefore have no application to a contract made out of the Province concerning chattels also out of the Province at the time the contract is made (40); and a conditional sale contract made in another Province or jurisdiction concerning chattels also there will not come under this Act, if the laws in force at the place where the parties and the chattels are have been complied with, although the chattels are subsequently removed into Nova Scotia (41). The statute does not in express terms transfer the property in the goods from the original bargainor who has failed to comply with the statute to the creditor, purchaser, or mortgagee of the hirer, lessee, or bargainee, or to the hirer himself, but it has the effect of striking out of the contract, so far as concerns such "creditors, purchasers and mortgagees," any part of same reserving property in the chattel. As between the parties themselves the contract remains valid, and if the conditional vendor resumes possession before the conditional vendee has incurred the debt with the creditor who attacks the vendor's claim, or before the vendee has sold or mortgaged the chattel, he will be enabled to hold it although the contract is not filed.

The expression "purchasers" is declared by the Act to mean bona fide purchasers (42), and to include the assignee of the *grantor* under the Indigent Debtors' Act, the official assignee or an assignee for the general benefit of creditors. The vendee upon a conditional sale is not, strictly speaking, a "grantor," but by reference to section 9 of the Act it will be found that

(40) *Singer v. McLeod*, 20 N.S.R. 341.

(41) *Singer v. McLeod*, 20 N.S.R. 341; *Bonin v. Robertson*, N.W.T. Rep. 89 (pt. 4); *Gosline v. Dunbar*, 32 N.B.R. 325.

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the term "grantor" is applied to the execution of a bill of sale "or other instrument," and section 2 gives a statutory meaning to the term "bill of sale" which appears to leave no "other instrument" subject to the statute and to which the latter term could have reference but a conditional sale contract. It is, therefore, submitted, although the matter is not free from doubt, that an assignee of a bailee upon a conditional sale, appointed under the Indigent Debtors' Act, or an official assignee, or an assignee for the general benefit of creditors, is a "purchaser" within the meaning of the statute.

The statutory definition of the term "creditors" as including constables and other persons levying on or seizing under process of law "personal chattels comprised in a bill of sale" would, however, seem by its terms not to apply to the case of a conditional sale agreement. As to the latter, the same distinction prevailed under the prior law, for the persons who could take advantage of the non-registration under it of a conditional sale contract were "creditors and subsequent purchasers and mortgagees" (44), while the failure to file a bill of sale enured to the benefit of the assignee of the grantor under the provisions of chapter 118 R.S.N.S., or for the general benefit of his creditors, bona fide purchasers, execution creditors, sheriffs and constables and other persons levying on or seizing the property comprised in a *bill of sale* under process of law (45).

Assuming then that the term "grantor" in section 9 applies to the bailee who executes an instrument of conditional sale, it will be necessary, if such bailee is not a resident of Nova Scotia and the chattels are per-

(44) R.S.N.S. 1884, c. 92, s. 3; 1886, c. 32, s. 1; 1893, c. 40, s. 1.

(45) R.S.N.S. 1884, c. 92, s. 1; 1886, c. 32, s. 2.

manently removed from the registration district in which they were at the time of the execution of such instrument to another registration district in the Province, before the payment and discharge of the bailor's claim, that a *copy* of the same and of the affidavits and documents relating thereto, certified by the Registrar in whose registry they were first filed, should be filed in the registry of deeds for the registration district to which they have been removed. This re-filing is required to be made within two months from the time of such removal, and a failure to comply with this provision will render the instrument null and void as against creditors or purchasers (46).

Ontario.—The Ontario Act respecting Conditional Sales of chattels, now chapter 149 of the Revised Statutes of Ontario, was passed by the Legislature in 1888, and came into force January 1st, 1889. It requires that bailments of certain chattels shall be evidenced in writing and that the writing be signed by the bailee or his agent in all cases where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase money or consideration money or some stipulated part thereof. These words in themselves indicate what is commonly known as a "conditional sale," a term which, as applied to goods, has now become a distinctive one to indicate such a transaction to the exclusion of contracts of sale made upon conditions of a different class. In the wider sense of the term, and apart from the more limited sense in which it is now used, a conditional sale would include a sale made upon any condition, whether it related to the

(46) N.S. Laws 1895, c. 28, s. 9.

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withholding of the right of property or not, and in this wider sense a contract of sale under which the property passes, but upon an agreement that the vendor may repurchase at a stated price within a limited time, is sometimes termed a conditional sale.

The application of the statute is in terms limited to "manufactured" goods or chattels, and the term "chattels" will in this connection refer only to such chattels as could be the subject of a bailment such as the statute contemplates, *i.e.*, where the possession is given to the bailee upon a bailment conditioned that he is to acquire no ownership in the chattel until a future time, and then only upon paying his purchase money (47). Household furniture, other than pianos, organs, or other musical instruments, are excepted from the operation of the Act (48). The bailor or vendor may, as an alternative to registration, affix his name and address to the chattel prior to or at the time of delivering possession to the bailee (49).

The name to be affixed is that of the conditional vendor or person reserving a right of property in the chattel, and if the manufacturer has parted with his property therein the fact that such manufacturer's name and address was painted on the chattel will not protect another person who has acquired the chattel and contracted for a conditional sale of the same. If the bailor's name be not "painted, printed, stamped or engraved" on the chattel, or "otherwise *plainly* attached thereto," a copy of the receipt note, hire receipt, order for the chattel, or other instrument evidencing the bailment and given to secure purchase money, must be filed with the Clerk of the County

(47) R.S.O. 1897, c. 149, s. 1.

(48) Sec. 2.

(49) R.S.O. 1897, c. 149, s. 1.

Court of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase. The time limited for such filing is 10 days from the time of the execution of the receipt note or instrument given to secure the purchase money or part of same (50). A clerical error which does not mislead, or an error in an immaterial or non essential part of the copy filed, will not invalidate the filing or destroy its effect (51). The Clerk of the County Court with whom such a filing is made, must properly enter it in an index book to be kept for that purpose, which together with the instrument filed, is open to public inspection on payment of a fee of five cents for each search in respect of any instrument (52). If the bailee or conditional purchaser resides at the time of the bailment or conditional purchase in an unorganized territorial district, the instrument must be filed with the Court Clerk with whom a chattel mortgage or a bill of sale is for the time being required to be filed (53).

For the districts of Algoma, Thunder Bay or Nipissing the place of registration is the office of the District Court Clerk.

For the districts of Parry Sound or Rainy River the place of registration is the office of the Clerk of the First Division Court of the district.

For the provisional County of Haliburton the registration must be made with the Clerk of the First Division Court for Haliburton at Minden.

For the district of Manitoulin the filing must be made with the Deputy Clerk for Manitoulin at Gore Bay (54).

(50) R.S.O. 1897, c. 149, s. 2.

(51) Sec. 4.

(52) Sec. 4.

(53) R.S.O. 1897, c. 149, s. 3 (1).

(54) R.S.O. 1897, c. 148, s. 15.

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The neglect to attach the name and address or to conform with the alternative of registration will invalidate the receipt-note, hire receipt or order as against subsequent purchasers or mortgagees for valuable consideration without notice in good faith (55).

The manufacturer, bailor or vendor is bound to furnish within 5 days after demand full information respecting the amount due or unpaid on any manufactured chattels coming within the scope of the Conditional Sales Act, to any proposed purchaser from the conditional vendee or to any other 'interested person' in answer to an enquiry made, and to state the terms of payment of the amount or balance due or unpaid (56). The person so signing may do so by letter or personally, but if the enquiry be by letter he must give a name and post office address to which a reply may be sent, and it will in such case be sufficient if the reply giving the requisite information be given by registered letter deposited in the post office within five days, addressed to the applicant at his proper post office address or, if the name and address of another person has been given to whom a reply may be sent, then it may be addressed to such other person (57). It would thus appear to be optional with the vendor whether or not he will furnish the information to anyone other than the enquirer himself. A refusal or neglect to furnish the information asked for and which the statute binds the bailor to supply will make him liable to a fine not to exceed \$50, recoverable on summary conviction before a Police Magistrate, Stipendiary Magistrate, or two justices of the peace, but with a right of appeal by the person convicted to the Judge of the County Court

(55) R.S.O. 1897, c. 149, s. 1.

(56) Sec. 6 (1).

(57) Sec. 7.

without a jury (58). There is no provision in Ontario for the re-registration of the hire-receipt or conditional sale contract upon the removal of the goods to another county or registration division, and a proposed purchaser from the person in possession of a manufactured chattel must ascertain as best he can what county the original purchaser upon a conditional sale resided in at the time of such original purchase.

Sales of merchandise to a trader for re-sale.

Ontario. Conditional sales made of "merchandise" to a 'trader or other person' for the purposes of re-sale in the course of business are subject to the Ontario Conditional Sales Act if the merchandise consists of 'manufactured' goods or chattels subject to its provisions (59). And, in case the merchandise does not consist of manufactured goods and chattels to which the Conditional Sales Act would apply, the agreement of conditional sale must still be registered under the Ontario Bills of Sale Act, R.S.O. 1897, c. 148, s. 41. That section enacts as follows:

41.—(1) In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void, and the sale or transfer shall be deemed to have been absolute unless

(a) The agreement is in writing, signed by the parties to the agreement or their agents, and

(58) Sec. 6.

(59) R.S.O. 1897, c. 148, s. 41 (4); R.S.O. 1897, c. 149, ss. 1, 2.

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(b) Unless such writing or a duplicate or copy verified by oath is filed in the office of the County Court Clerk of the county or union of counties or in the proper office in a district in which the goods are situate at the time of making the agreement, and also in the office of the County Court Clerk of the county or union of counties or in the proper office in a district in which such trader or other person resides at the time of making the agreement, such filing to be within five days of the delivery of possession of any of the goods under the agreement.

A conditional sale of household furniture made to a trader for purposes of re-sale in the course of business, will come within section 41 of the Bills of Sale Act and must be filed within 5 days of the delivery of possession of *any* of the goods under the agreement (60). The persons as to whom the transfer will by virtue of the statute be deemed to have been absolute if not duly filed, and for whose protection the statute was passed, are the 'creditors, mortgagees or purchasers' of or from the conditional vendee. And an agreement though signed and filed will not affect purchases from the 'trader or other person' in the usual course of his business (61).

In the territorial districts of Muskoka, Nipissing, Algoma, Thunder Bay and Rainy River the agreement shall be filed in the office of the Clerk of the Peace in the district, and in the districts of Parry Sound and Manitoulin in the office of the registrar of deeds for the district; Provided that if a Clerk of the Peace shall be appointed for the district of Parry Sound or the district of Manitoulin then any agreement requiring thereafter to be filed in such district

(60) R.S.O. 1897, c. 148, s. 41.

(61) R.S.O. 1897, c. 148, s. 41 (3).

shall be filed in the office of such Clerk of the Peace (62).

No provision is made for requiring the vendors to give information to proposed purchasers in cases of sales to traders which do not come within the Conditional Sales Act but which are required to be registered under section 41 of R.S.O. chapter 148. This omission must be considered a serious defect in the enactment, a defect which would have been avoided if the clause had been inserted in the Conditional Sales Act instead of in the Bills of Sale Act.

The term merchandise is usually, if not universally, limited to things that are ordinarily bought and sold or are ordinarily the subjects of commerce and traffic (63). It covers all those things which merchants sell, either by wholesale or retail, as dry goods, hardware, groceries, drugs, etc. (64). Provisions daily sold in market, and horses, cattle and fuel are not usually included in the term "merchandise," and realty is never included; the word conveys the idea of personalty used by merchants in the course of trade, and is usually applied to property which has not yet reached the hands of the consumer (65). It does not apply to mere evidence of value, as a note, a policy of insurance, a bill of lading, and the like, although some of these are sometimes bought and sold (66).

Prince Edward Island.—Conditional sales of "manufactured" goods or chattels are required by statute to

(62) Sec. 41 (2).

(63) *Citizens' Bank v. Nantucket Steamboat Company* (1841) 2 Story (U. S. C. C.) 53; *Passaic v. Hoffman* (1871) 3 Daly (N.Y.) 512.

(64) *Kent v. Liverpool & London Ins. Co.* (1866), 26 Ind. 297; Bouvier's Law Dict.

(65) *The Marine City* (1881), 6 Fed. Rep. 413.

(66) *Citizens' Bank v. Nantucket* (1841) 2 Story (U.S.) 53.

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be evidenced in writing signed by the bailor or his agent in all cases where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof (67); but household furniture (exclusive of pianos, organs and other musical instruments) is excluded from the operation of the statute (68). The Act is similar in form to that in force in Ontario and is designed for the protection of subsequent purchasers or mortgagees of the chattel for value and in good faith claiming under the conditional purchaser without notice of the defect in his title (69). The manufacturer or bailor of goods coming within the Act has two methods open to him to protect his claim of property in the goods, reserved until payment of the purchase price. He may have his name and address painted, stamped or engraved on the chattel or otherwise plainly attached thereto, and he will in that case be protected in regard to his claim, provided he furnishes full information within 15 days after demand to any proposed purchaser of the article or to any other "interested person" *i.e.* a person having an interest of which the law takes cognizance in the conditional vendee's right of purchase or equity in the chattel. Instead of having his name affixed, where such affixing is practicable, in the manner required by the statute, the manufacturer or bailor may file with the Prothonotary or Deputy Prothonotary of the County in which the bailee or conditional purchaser resides at the time of the bailment or conditional purchase, a copy of the receipt-note, hire receipt, order or

(67) Stat. P.E.I. 1896, c. 6, s. 1.

(68) Stat. P.E.I. 1896, c. 6, s. 6.

(69) Stat. P.E.I. 1896, c. 6, s. 4.

other instrument given to secure the purchase money and evidencing the bailment or conditional sale (70). The filing must be effected in the proper office within 10 days from the execution of a receipt-note, hire receipt, etc. If the chattel be of a kind upon or to which it is impracticable to "paint, print, stamp, engrave or otherwise plainly attach" the bailor's name and address, the filing of a copy of the document evidencing the bailment is the only method under which the bailor will be secured as to his claim of property in the goods. The manufacturer, bailor or vendor is bound to furnish information to any interested person respecting the terms of payment and the balance unpaid on any manufactured goods and chattels with the exception before stated of household furniture but not excepting musical instruments; and the application may be made either personally or by letter and in the latter case must be accompanied with return postage for a registered reply (71). A refusal or neglect will not only lay the bailor liable to a fine on summary conviction before two justices of the peace, or a stipendiary or police magistrate, but will disentitle the person so in default to any benefit of his lien in the property in question (72). Coupled as it is with a money penalty imposed as for a quasi-criminal offence, it is submitted that this provision of forfeiture of the benefit of the lien (a term which from the context must mean the right of property reserved), will apply as an additional punishment, and may be taken advantage of by the conditional purchaser himself or by any person having an interest in or claim upon the chattel whether or not such person be the enquirer, or applicant for the information.

(70) Stat. P.E.I. 1896, c. 6, s. 6.

(71) Stat. P.E.I. 1896, c. 6, ss. 2 and 3.

(72) Stat. P.E.I. 1896, c. 6, s. 2.

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Chattel Defined.—The word "chattel" includes any species of property not being real estate or freehold (73), and may refer either to a chattel personal or to a chattel real, but in statutes referring to chattels which are the subject of a bailment the meaning of the term is necessarily restricted to chattels personal and to such articles of that designation as may be the subject of a bailment. Chattels personal are things moveable which may be annexed to or attendant on the person of the owner and carried about with him from one part of the world to another, such as animals, household stuff, money, jewels, grain, garments and everything else that can be put in motion and transferred from place to place (74).

Bailment is the general name applied to a class of contracts of which the common element consists in the delivery by one person (the bailor) to another person (the bailee) of the possession of chattels either to be delivered by the bailee to a third person or to be re-delivered to the bailor when the purpose of the bailment is at an end; it may confer on the bailee a special property or interest in the chattel by which he has a right to retain possession of it for a time as against his bailor. Unless the parties otherwise stipulate by their contract, the bailee will be excused from the performance of his promise to re-deliver the chattel if it becomes impossible to do so because it has perished, unless such impossibility arises from the fault of the bailee (75).

Right to possession reserved as well as right of property.—It has been held under the Manitoba Lien Notes Act (76) that a promissory note which provided

(73) 2 Kent Com. 342.

(74) 2 Bl. Com. 387.

(75) *Taylor v. Caldwell* (1853) 3 B. & S. 826.

(76) Lien Notes Act, R.S.M. 1891, c. 87.

that the *right* to the possession of the property for which the note is given shall remain in the vendor, did not come within the Act, for the latter was by its terms limited to cases "where the condition of the "bailment is such that the *possession* should pass "without any ownership therein being acquired by the "bailee," and because the Act further provided that no such bailment shall be valid unless it be evidenced in writing signed by the person then *taking possession* of the chattel (77). The document was in the following form:—

"\$153.00.

Winnipeg, Aug. 14, 1891.

"Six months after date I promise to pay to W— or order at "the Bank of —, Winnipeg, the sum of \$153 with interest at 8 per "cent. per annum till paid, for value received.

"It is distinctly understood and agreed that the title ownership "right of property and right of possession of and in the property for "which the within note is given shall remain in the vendor or holder "of this note until this note shall be fully paid, and in consideration "of credit being given me I hereby waive all rights (as to this debt) "to the exemption from seizure or sale under execution of any lands, "goods, or chattels that would otherwise be exempt, and that are "now and will be in my possession, the goods for which this note is "given being one black mare, Gwendoline, rising 8 years.

"(Signed) W. H. M—.

"(Signed) F. W. R—."

The Court of Queen's Bench of Manitoba held that the note was neither a receipt note, hire receipt, or an order for a chattel under the Manitoba Act (78); Mr. Justice Dubuc in that case said: "It is true that "the bailee was allowed to take the mare and use her, "but as he agreed under his signature that notwithstanding that kind of *de facto* delivery, the right of "possession was not to be in him, but should remain "in the vendor or holder of the document, he must be "bound by his agreement, and when he bargained for

(77) R.S.M. 1891, c. 87, s. 2.

(78) *Sutherland v. Mannix*, 8 Man. R. 541; followed by Dubuc, J., in *Boyce v. McDonald*, 4 Western Law Times, 57.

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"the sale of the mare to the defendant he could not transmit to his bargainee a superior or more extensive right than he possessed himself, unless under circumstances specially contemplated and provided for by statutory enactment."

The report of the case does not show whether there was any evidence that the vendee had taken possession of or was to have possession of the chattel, and this circumstance is referred to by the Supreme Court of the North West Territories as having possibly influenced the conclusion arrived at (79.) It is submitted, however, that the better doctrine is that contained in the opinion of Mr. Justice Wetmore in delivering the judgment of the Supreme Court of the North West Territories (80) where he thus comments on the discussion in *Sutherland v. Mannix* (81).

"If the Court of Queen's Bench of Manitoba intended to decide that, notwithstanding the possession may have passed to the vendee, because the note provided that the right of possession should remain in the vendor, no possession passed to the vendee, and therefore the note was not within the Act, I must state with the very greatest respect that I do not agree with the decision. I think that *possession* is one thing, and a *right of possession* is quite another. If the vendee has the actual visible possession it is none the less such a possession because a form of words says that the *right* of possession is in someone else" (82).

Share in Chattel.—A conditional sale of an undivided share in a chattel if accompanied by delivery of possession of the chattel itself would seem to be

(79) *Western Milling Co. v. Darke* (1894) 2 N.W.T. Rep. 34, 45.

(80) *Western Milling Co. v. Darke* (1894) 2 N.W.T. Rep. 34, 46.

(81) 8 Man. Rep. 541.

(82) *Western Milling Co. v. Darke* (1894) 2 N.W.T. Rep. 34, 46.

within the Ontario Act; the ownership which the conditional vendee is to acquire at a future time on payment of the purchase money need not be the complete ownership, the words of the statute being "*any* ownership" (83).

Manufactured Goods.—The word "manufactured" indicates something of a corporeal and substantial nature—something that can be made by man from the matters subjected to his art and skill; or at the least some new mode of employing practically his art and skill, is required to satisfy the word. The word "manufacture" has been generally understood to denote either a thing made which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope and many others; or to mean an engine or instrument or some part of an engine or instrument to be employed either in the making of some previously known article, or in some other useful purpose, as a stocking frame, or a steam engine for raising water from mines; or it may, perhaps, extend also to a new process to be carried on by known implements or elements acting upon known substances and ultimately producing some other known substance but producing it in a cheaper or more expeditious manner or of a better or more useful kind; no mere philosophical or abstract principle can answer to the word "manufactures" (84). "Manufactured goods" means goods the manufacture of which is completed so that the goods are in a condition to be sold, and so that all that needs to be done if a purchaser asks for them is to deliver them (85). An article is as much one of manufacture

(83) R.S.O. 1897, c. 149, s. 1.

(84) *R. v. Wheeler* 2 B. & Ald. 349, per Abbott, C. J.

(85) *United States v. Tobacco* 5 Ben. (U.S.) 129.

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and of trade whether it be manufactured and sold as a pattern or for actual use (86). The word "manufacture" seems to imply a proceeding wherein the object or intention of the process is to produce the article in question. The residuum or refuse of various kinds of manufactories is more or less valuable for certain purposes, and may be and often is the subject of sale, but it is not expected that the skill and attention of the manufacturer is to be devoted to the quality of the refuse material; this is not the object of the process and its quality is wholly subordinate, and disregarded when attention to it would interfere with the most profitable mode or material to be used in the process which is the main object of the manufacturer (87). Firewood is not a "manufactured article" (88) nor is hay, for change of name and manipulation do not necessarily constitute manufacture (89) nor ice cut and stored where produced without artificial means (90). But timber split into staves is "manufactured" (91).

When the term "manufactured" is applied to a commodity the question arises, has it been removed from its character of raw material, and consideration must be given to the acceptance in which the term "manufactured" is used among dealers in the trade as applied to the particular article. Marble cut into blocks for convenience of transportation is in consequence considered not to be "manufactured" (92).

(86) *Heywood v. Potter* 1 El. & Bl. 439.

(87) *Holden v. Clancy* 58 Barb. (N.Y.) 590.

(88) *Correrio v. Lynch* 65 Cal. 273.

(89) *Frazer v. Moffitt* 20 Blatch. (U.S.) 267.

(90) *Byers v. Franklin* 106 Mass. 131; *Hittinger v. Westford* 135 Mass. 262; but see *Atty. Gen. v. Lorman* 59 Mich. 157.

(91) *United States v. Hathaway* 4 Wall. (U.S.) 404.

(92) *Hartvanft v. Wiegmann* 121 U.S. 615.

Time for Registration. The time for filing is 'within 10 days from the execution' of the receipt note, etc., under the Ontario Conditional Sales Act, and 'within 5 days of the delivery of possession of any of the goods' in cases of sales of merchandise to traders for re-sale in cases not within the last mentioned Act but coming within section 41 of the Ontario Bills of Sale Act (93).

In Ontario it has been provided by statute that if the last day of the time limited falls upon a Sunday or a statutory holiday, the filing may be effected on the next juridical day, or day next following the holiday and not being a Sunday or other holiday, and the time so limited will extend to such following day (94); and similar enactments are in force in most of the other Provinces (95). The first day of the 10 days (or 5 days as the case may be) is to be excluded in computing the time (96); "within" a stated number of days excludes the first day and includes the last (97). The presumption of law is that an instrument was executed upon the day of its date but this may be rebutted (98).

Sundays and holidays coming within the ten days are to be counted, subject to the statutory provision before mentioned (99).

(93) R.S.O. 1897, c. 148, s. 41 (1b).

(94) R.S.O. 1897, c. 1, s. 8 (16) and (17); R.S.O. 1897, c. 148, s. 30.

(95) R.S.B.C. 1897, c. 1, s. 10 (19); Con. Ord. N.W.T. 1898 c. 1, s. 8 (21); Sup. Ct. Act of Nova Scotia R.S.N.S. 5th series Order LX. r. 3.

(96) *McLean v. Pinkerton* 7 Ont. App. 490.

(97) *McDonald v. Vinette* (1883) 58 Wis. 620.

(98) *Beekman v. Jarvis* 3 U.C.R. 280; *Shaughnessy v. Lewis* 130 Mass. 355.

(99) *McLean v. Pinkerton* 7 Ont. App. 490.

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Enquiry by proposed purchaser or other interested person.—The term 'other interested person' coupled as it is with the words 'proposed purchaser' which precede it, would seem not to include the conditional vendee himself as a person entitled to make a demand for information under the statute, but, if another person who is entitled to make the demand is refused the information, the language of the statute appears to declare a forfeiture of the benefit of the lien without any limitation as to any class of persons or other restrictions thereon. The term 'interested person,' as applied to a witness, indicates such relation to the matter in issue as creates a liability to pecuniary gain or loss from the event of the suit (100). The phrase "persons interested" as applied to real estate has been said to include not only the person in whom is vested the legal title, but also other individuals having some independent right or interest therein not amounting to an actual legal estate, such as an easement of a right of way, inchoate rights of dower or curtesy, or encumbrances, such as by judgments or mortgages, which are charges or liens on the legal estate (101).

Incumbrancers upon the shares of persons entitled in common to real estate are "parties interested" in the property (102).

The interested "person" may be a body corporate or politic, and will include the legal representatives of a person (103).

The word "person" may, apart from statutory enactment, include a corporation as a person in law, as

(100) *Northampton v. Smith* (1846) 11 Metc. (Mass.) 394.

(101) *State v. Easton Ry. Co.* 36 N.J. Law 184.

(102) *Davenport v. King*, W.N. (1883) 133.

(103) Interpretation Act, R.S.O. 1897, c. 1, s. 8 (13); R.S. B.C. 1897, c. 1, s. 10 (14); R.S.M. 1891, c. 78, s. 8 (*m*).

well as a natural person, although in its popular sense and ordinary use it does not extend so far (104).

Lord Selborne, L.C., thus enunciated the rule of interpretation:—"If a statute provide that no person shall do a particular act except on a particular condition, it is *prima facie* natural and reasonable (unless there be something in the context or in the manifest object of the statute; or in the nature of the subject-matter to exclude that construction) to understand the legislature as intending such persons as, by the use of the proper means, may be able to fulfil the condition, and not to those who, though called 'persons' in law, have no capacity to do so at any time, by any means, or under any circumstances whatsoever" (105).

Applying that rule there seems to be no doubt that an interested corporation would be included as an interested person, apart from the Interpretation Acts.

Territorial Jurisdiction.—The law of the province in which the goods are situate when conditionally sold will govern as to registration requirements, although the parties reside elsewhere (106); but the law of the place of contract governs as to the construction of the contract.

If property be conditionally sold in one province and be situate therein, compliance with the recording statute of that province will entitle the vendor to enforce his claim thereto in another province to which the goods are afterwards removed by the vendee (107),

(104) *Pharmaceutical Society v. London* (1830) 5 App. Cas. 857.

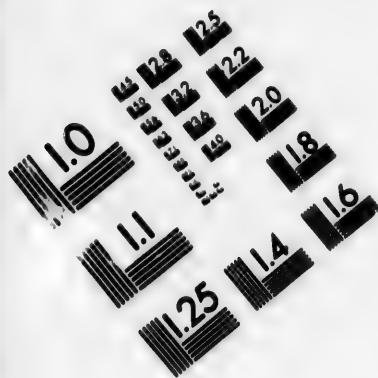
(105) *Pharmaceutical v. London* (1830) 5 App. Cas. at p. 862.

(106) *River Slave Co. v. Sill* 12 Ont. R. 557; *Marthinson v. Paterson* 19 Ont. App. 188.

(107) *Gosline v. Dunbar*, 32 N.B.R. 325; *Singer Machine Co. v. McLeod* 20 N.S.R. 341. *Banin v. Robertson* 1 N.W.T. Rep. pt. 4, p. 89.

unless the laws of the province into which the goods are removed makes special provision to the contrary, e.g., for re-registration within a limited time after the goods enter that province, or a district thereof.

Re-registration is at present limited to cases of removal from one district in a province to another district in the same province, and no provision has been made compelling re-registration in the province to which goods are removed of a conditional sale contract made in another province before the removal of the chattels therefrom.





CHAPTER III.

THE CONDITIONAL VENDOR.

Leaving copy of agreement with vendee.—Under the laws of Ontario, British Columbia, New Brunswick, and Prince Edward Island, a copy of the receipt-note, hire receipt, order, or other instrument by which a lien on the chattel is retained, or which provides for its conditional sale, must be left by the manufacturer, bailor or vendor, with the bailee or conditional vendee "at the time of the execution of the instrument or within 20 days thereafter" (1).

Liability for defects.—The gratuitous lender of a chattel must be taken to lend for the purpose of a beneficial use by the borrower; the borrower is therefore not responsible for reasonable wear and tear, but he is for negligence, for misuse and for gross want of skill in the use. On the other hand, as the lender lends for beneficial use, he is responsible for defects in the chattel, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured (2). There is an implied guarantee on the part of a person letting out a chattel on hire that it is suitable for the purpose for which such chattel is ordinarily used (3).

Conditional sales with charge on land.—Not infrequently a contract of conditional sale contains a clause

(1) R.S.O. 1897, c. 149, s. 5; R.S.B.C. 1897, c. 169, s. 31; Stat. N.B. 1899, c. 12, s. 4; Stat. P.E.I. 1896, c. 6, s. 8.

(2) *Blakemore v. Bristol & Exeter Ry.* 8 E. & B. 1035; Smith's L.C., 10th ed. 229.

(3) Beven on Negligence, 501.

whereby the bailee charges his real estate with the price of the article. In the province of Manitoba, however, there is a statutory prohibition against the registration against lands, of any lien notes, hire receipts, orders for chattels, or documents, or instruments, which contain as a portion thereof or have annexed thereto or endorsed thereon an order, contract or agreement for the purchase or delivery of any chattel or chattels, and the Registrar must refuse to receive the same (4).

If, however, by inadvertence or mistake such a document should be recorded, its registration will be a nullity (5). The Act applies from and after March 11th, 1893, and also prevents the filing of a caveat under the Manitoba Real Property Act, if such caveat refers to or is founded upon any charge of lands embodied in a lien note, hire receipt, order for chattels or conditional sale contract (6).

By a subsequent statute (7) passed to remove doubts as to the operation and effect of the Act of 1893, it was further declared that every lien note, hire receipt, order for chattels, or document or instrument, the registration of which is prohibited by that Act, shall be absolutely null and void so far as the same purports to affect land, as against any person or corporation claiming an interest or estate in lands under a registered instrument; and that no notice actual or constructive to the person claiming under such registered instrument shall avail to the contrary, but that such notice shall be "void and of no effect whatever" (8).

(4) 56 Vict. (Man) 1893, c. 17, s. 1, 2.

(5) Sec. 3.

(6) Sec. 1 (2).

(7) Stat. Man. 1894, c. 14.

(8) Stat. Man. 1894, c. 14, secs. 1 and 2.

Destruction of Chattel.—Where from the nature of the contract it appears that the parties must, from the beginning, have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused, in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor (9). So, if the contract provides that the property is to remain in the vendors, and that they may resume possession not only for default in payment, but in case the conditional vendee leaves the machine, the subject-matter of the conditional purchase, unprotected, or in case any of his representations as to his financial standing are untrue, or in case for any other good cause the conditional vendors desire to resume possession, such cannot properly be called a 'contract of sale,' but is an executory agreement for a future sale on performance of certain conditions; and it may well be assumed that it was naturally in the contemplation of the parties that the subject-matter of the bargain should continue to exist (10).

Insurance.—In *Waterous v. McCann* (11) certain mill machinery was sold under an agreement which provided that a mortgage of the mill property was to be given to the vendors by the purchasers as partial

(9) *Taylor v. Caldwell*, 3 B. & S. 833.

(10) *Sawyer v. Pringle* (1891) 18 Ont. App. 218, 221.

(11) (1894) 21 Ont. App. 486.

security for the price, and it was also agreed that the machinery was not to form part of the real estate, but was to remain personal property, although attached to the realty, and that it should remain personal property until the full payment of the price, and the property therein and title thereto was to remain in the vendors, and not to pass to the proposed purchasers until such payment. The proposed purchasers had, under the agreement, the possession and use of the machinery until default should be made in the payment of the price, or some part thereof, or of any obligation given therefor, "but at the purchasers' risk as to damage or destruction by fire or any other cause." Subsequently, the conditional purchasers mortgaged the realty, in pursuance of the contract, to the conditional vendors, and therein covenanted, in the form provided in the Ontario Short Forms of Mortgages Act, to insure the buildings on the lands.

An insurance was thereupon effected in the name of the millowners on the building and machinery, and the loss made payable by the policies to the conditional vendors; but the millowners placed a subsequent insurance on them, payable to themselves, but gave no notice of this either to the conditional vendors or to the companies carrying the prior insurance, by reason of which the prior policies become void. A fire occurred, and the last insuring company, whose policy was in favour of the millowners alone, consented to pay a sum at which the loss was adjusted. The conditional vendors thereupon claimed payment of the same as the land mortgagees, and by virtue of the covenant for insurance contained in the mortgage. The Court of Appeal of Ontario was equally divided as to whether or not the conditional vendors were entitled to the insurance moneys, and, in the result,

the judgment of Mr. Justice Falconbridge, holding that they were so entitled, was affirmed (12).

Hagarty, C.J.O., and MacLennan, J.A., held that the machinery became in law part of the freehold subject to an agreement between the owner of the freehold and the vendors of the machinery, that for certain purposes as between themselves it should remain personal property; that the machinery was therefore, in law, real estate, but, in equity, as between the parties and by virtue of their agreement, it was to be regarded as personal property; that the mortgage and the covenant for insurance covered the machinery, and that it was immaterial that the parties had agreed that, notwithstanding the mortgage, the property should be regarded as personal property, such agreement being only for a limited purpose *i.e.* to enable the conditional vendors to take back the machinery and to sever it if necessary from the land in order to secure their debt.

On the other hand, Burton, J.A., (now Chief Justice of Ontario) and Osler, J.A., held that the conditional vendors of the machinery were not entitled to any more of the insurance money than the amount adjusted in respect of the building; that the machinery being by the agreement personal property, the title to which did not pass to the land mortgagors, it was not subject either to the mortgage or to the mortgage covenant for insurance; that the conditional vendors were entitled to insure in their own name by virtue of their reserved title but that they had no right to the insurance which the conditional vendees were justified in obtaining for themselves; that the mortgage conferred on the vendors no right to insure the machinery, and that they did not have an

(12) *Waterous Engine Works Co. v. McCann* (1894) 21 Ont. App. 486.

equity to the insurance moneys in question because of the insurance first obtained (which was taken out in the name of the mill owners as the parties insured and not in the name of the conditional vendors alone as they were entitled to have made it) having been defeated or lost by means of the mortgagors' act in effecting subsequent insurance without the assent of the prior insurers (13).

Vendor to Supply Information.—If the bailment takes place in British Columbia, the bailor is bound by a statute in force in that province to furnish to any proposed purchaser or other interested person, within 5 days, full information respecting the amount or balance due or unpaid in respect of manufactured chattels the subject of a conditional sale (14); and his neglect to do so will make him liable to a fine not exceeding \$50 on summary conviction before a stipendiary or police magistrate or two justices of the peace (15). If the enquiry be by letter the information should be supplied by *registered* letter in reply, and the deposit of the letter in the post-office within the 5 days specified, is, in that case, the statutory equivalent of furnishing the information within five days (16).

In Ontario the vendor must also furnish information within 5 days in answer to an enquiry made by any proposed purchaser or 'other interested person'; the penalty for non-compliance being a fine not exceeding \$50, recoverable on summary conviction (17). The justices of the peace or magistrate may,

(13) *Waterous Co. v. McCann* (1894) 21 Ont. App. 486.

(14) R.S.B.C. 1897, c. 169, s. 26.

(15) Sec. 26.

(16) Sec. 27.

(17) R.S.O. 1897, c. 149, s. 6.

in their discretion, order that the defendant shall pay to the complainant such costs as to them seem reasonable, not being inconsistent with the fees established by law to be taken on proceedings before justices (18); and the sums so allowed for costs shall be specified in the conviction or order, and shall be recoverable in like manner as the penalty, and will extend to and include the costs and charges of distress and of commitment and conveying the defendant to prison, but the amount of the latter costs must be ascertained and stated in the commitment (19).

The like proceedings may be taken for recovering the penalty under the Ontario Act, as might be taken under the Criminal Code of Canada had the offence been under a Dominion statute (20).

If the complaint be dismissed the magistrate may, in his discretion, order that the prosecutor or complainant shall pay to the defendant such costs as to the magistrate seem reasonable, and as are consistent with law (21); but such costs are recoverable only by distress and sale of the goods and chattels of the party ordered to pay them, and not by imprisonment (22).

There is a special right of appeal, however, from the justices or magistrate to the County Court judge of the county sitting without a jury (23).

The appeal lies only on behalf of the person convicted, and is to be heard in Chambers, and is subject to the procedure prescribed by the revised Act respecting appeals to the County Court judges (24).

(18) R.S.O. 1897, c. 90, s. 4.

(19) R.S.O. 1897, c. 90, s. 4 (3).

(20) R.S.O. 1897, c. 90, s. 2.

(21) R.S.O. 1897, c. 90, s. 4 (2).

(22) Sec. 4 (5).

(23) R.S.O. 1897, c. 149, s. 6 (2).

(24) R.S.O. 1897, c. 92.

The appellant is required to deposit with the convicting justice the amount of the penalty and the costs, and a further sum of \$10, or with two sufficient sureties to enter into a recognizance before a justice of the peace in a sum double the amount of the penalty, and costs ordered to be paid, which recognizance (25) is to be conditioned duly to prosecute the appeal, and to abide by and perform the order of the judge thereupon, and to pay such costs as he may order (26).

In Manitoba the manufacturer and his agents must *forthwith*, on application, furnish to *any* applicant full information respecting the balance due on any manufactured goods the subject of a conditional sale agreement (27). His neglect or refusal will lay him liable to a fine of not more than \$50 nor less than \$10 on summary conviction before a justice of the peace (28).

The word "forthwith" has not always the same meaning. Where the act to be done is judicial and discretionary, "forthwith" will mean "immediately" (29); but as applied to a contract or to the ordinary transactions of life, it usually does not mean "immediately," but "with all possible celerity" (30). It is to be construed according to circumstances, but where the act required to be done "forthwith" is one which is capable of being done without any delay, no delay can be permitted (31). In an action against an over-

(25) R.S.O. 1897, c. 92, Form 1 in schedule.

(26) Sec. 3 (b).

(27) R.S.M. 1891, c. 87, sec. 3.

(28) Sec. 3.

(29) *Grace v. Clinch* 4 Q.B. 606; *Chaplin v. Levy* 9 Ex. 673; *R. v. Berkshire* 27 W.R. 798.

(30) *Burgess v. Boetseur* 7 M. & G. 494; *Morton v. Bank of Montreal* (1897 N.W.T.) 18 Can. L.T. 157.

(31) *Re Southam* 19 Ch. D. 169, per Jessel, M.R.

seer for not giving a copy of a rate "upon demand, forthwith," it was held that the time was such as the jury might think reasonable (32).

In New Brunswick, on the demand of any creditor of the conditional vendee or on the demand of any person having an interest in the chattel or in the conditional vendee's right of purchase thereof, the manufacturer, or other bailor or vendor as the case may be, must file a sworn statement of the amount due on any such receipt note, hire receipt or order (33).

The filing is to be made with the Registrar of Deeds of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase (34), and must be effected within 20 days from the making of the demand (35).

A failure to file a statement as the Act requires will operate so as to forfeit all rights accruing under the receipt note, hire receipt, or order to the bailor, as against the creditor or interested person who has made the demand for same (36).

In Prince Edward Island the manufacturer, bailor or vendor is by statute required to furnish within 15 days to any proposed purchaser or other interested person applying therefor, full information respecting the amount or balance due or unpaid on any manufactured goods and chattels of which a conditional sale has been made, and the terms of payment of such amount or balance (37).

(32) *Tennant v. Bell* 9 Q.B. 684.

(33) Stat. N.B. 1899, c. 12, s. 5.

(34) Sec. 2.

(35) Sec. 5.

(36) Stat. N.B. 1899, c. 12, s. 5.

(37) Stat. P.E.I. 1896, c. 6, s. 2.

In case of his refusal or neglect to do so, the conditional vendor becomes liable to a fine not exceeding \$50, on conviction before a stipendiary or police magistrate, or two justices of the peace, with a right of appeal by the convicted party to the Supreme Court of the province (38). He will also disentitle himself, by such refusal or neglect, to the benefit of his lien on the chattels (39).

The inquiry may be made either personally or by registered letter, and in the latter case the post-office certificate of registration and the oath of the person who deposited the letter, shall be *prima facie* evidence of the date and service of the application (40).

An application by letter must give a name and post office address, to which a reply may be sent, and postage stamps sufficient to pay the postage on a registered reply, must be enclosed. It will be sufficient if the information which the Act compels the bailor to furnish is given by registered letter deposited in the post office within the 15 days, addressed to the enquirer at his proper post office address, or, where a name and address is given as aforesaid, addressed to such person by the name and at the post office as given (41).

Re-taking possession. If the vendor exercises a right given him by the contract to take back the chattel to make good the default, such is in law a rescission of the contract unless the contract contains some provision to the contrary (42).

(38) Stat. P.E.I. 1896, c. 6, s. 2.

(39) Sec. 2.

(40) Sec. 2.

(41) Sec. 3.

(42) *Leonor v. McLaughlin* (1895) 32 L.R.A. 467, 165 Pa. 150.

If after the whole price is due, the vendor continues to receive payments and permits the vendee to retain possession, he must make a demand of payment before seizing the property and terminating the contract (43). It is the common law right of a person whose chattels are on the land of another under some arrangement which has ended, to enter upon the land to resume possession of his goods, without thereby committing a trespass (44).

Where machinery was sold upon the terms expressed in the contract that "the title of and right to the possession of the property wherever it may be shall remain vested in (the vendor) and subject to "his order until paid for in full," the vendor or his assigns has the legal right on default to enter upon the premises where the property is, in order to resume actual possession of the machinery, giving notice and using all care in so doing; but it would be illegal for the vendor to take possession by force, and an injunction may properly be granted to restrain threatened acts of force by the vendor, but the applicant may be put upon terms that he is not to interfere forcibly with the rights of the vendor in respect to the machinery (45).

Where the conditional vendee took the chattel sold to a room hired by him in the house of a third person, the latter having no knowledge that the vendee's title was conditional, and upon default the vendor went to the house in the absence of the vendee to remove the chattel, and although requested by the wife of the householder to wait until the return of the vendee, refused to do so and pushing her aside entered the

(43) *O'Rourke v. Hadcock* 114 N.Y. 541.

(44) *Patrick v. Colarick* 3 M. & W. 483.

(45) *Traders' Bank v. Brown* (1889) 18 Ont. R. 430.

room and took the chattel away, it was held that such entry was not reasonable and that the vendor was liable for an assault (46). If a bailiff or employee, in the course of removing a chattel by force under the right reserved by the contract, assaults a person, his employer may be liable in damages for the assault: for if an agent authorized to do a thing properly, exceeds his authority by doing it improperly but while acting within the scope of his employment, the mere fact of the excess of authority involving a criminal act does not absolve the employer or master from liability (47).

It is frequently provided in contracts of conditional sale that the vendor may, on default, break open doors and bars, and otherwise enter by force for the purpose of removing his goods. Whether or not a forcible entry into a dwelling house merely for the purpose of taking away furniture or other chattels upon a bona fide claim of title thereto is a "forcible entry" within the Criminal Code of Canada (sec. 89) was the question in a recent case before the Court of Queen's Bench for Manitoba; and it was held that it was a mere trespass, and not a "forcible entry" under the Code, although made contrary to the will of the occupant, and in a manner likely to cause a breach of the peace (48).

The court there held that to constitute a "forcible entry" on land under the Criminal Code, sec. 89, the act of going upon the land must be done with the intention of taking possession of the land itself (49).

(46) *Drury v. Hervey* 126 Mass. 519.

(47) *Dyer v. Munday* (1895) 1 Q.B. 742.

(48) *The Queen v. Pike* (1898) 2 Can. Cr. Cas. 314.

(49) *Ibid*; but see *Edwick v. Hawkes* 18 Ch. D. 199; *Dyer v. Munday* (1895) 1 Q.B. 742.

A seller by conditional sale who retakes the property and retains it puts an end to the contract of sale, and cannot recover the purchase price (50).

An article sold on instalments by a so-called lease retaining title until full payment is made can be retaken on default without returning the partial payments that have been received (51).

Two machines were sold under lien notes given to the vendors, which contained the following clauses :

"The title, ownership and right to the possession of the property for which this note is given shall remain in A. Harris, Son & Company (Limited), until this note or any renewal thereof is fully paid ; and if default is made, or should I sell or dispose of my landed property, or if for any reason A. Harris, Son & Company (Limited) should consider this note insecure, they have full power to declare it due and payable, even before maturity. I also waive all homestead and exemption laws as to this debt."

Default having been made in payment, the vendor's agent seized the machines, and used one of them on his own farm, and also allowed another person to use it elsewhere and afterwards sued the conditional vendee for the price, after giving him notice that the machines were at the agent's place, and that the vendee was at liberty to remove them at any time. It was found as a fact that the machines had been injured or worn while in the agent's hands more than they would have been with the exercise of reasonable care. The Supreme Court of the North-West Territories held that the vendor was not entitled to recover on the notes, and that the contract had become rescinded, although there had been no re-sale (52).

Mr. Justice Wetmore in that case thus enunciates the principles applicable :—"I am not prepared to hold that the mere fact that the vendor when he

(50) *White v. Smith* 28 N.S.R. 5.

(51) *White v. Oakes* 88 Me. 367, 34 Atl. Rep. 175.

(52) *Harris v. Dustin* (1892) 1 N.W.T. Rep. 6 (part 4).

" re-possessed himself of the article did so with the
" intention of selling it, in itself would amount to a
" rescission of the contract, or would justify the buyer
" in treating it as a rescission, nor am I prepared to
" hold that the additional fact that he offered it for sale,
" or attempted to sell it, would amount to a rescission.
" If the vendor wishes to hold the buyer to his agree-
" ment, and enforce his claim against him for the price,
" he has simply the right to hold the article, and he is
" bound to take care of it. The buyer has a right to
" insist (a) that the vendor shall not use it ; (b) that the
" vendor will not allow other persons to use it, and (c)
" that the vendor shall take care of it " (53).

The natural increase of animals, the subject of a conditional sale, will be subject to the terms of the contract, and the title and property therein will belong to the vendor in like manner as the title and property in the animal sold (54).

The vendor in a conditional sale of chattels waives default for nonpayment of the purchase price at maturity by allowing the vendee to remain in possession of the property and accepting a partial payment ; and he cannot thereafter take possession of the property without a prior demand upon the vendee for the payment of the balance (55).

Where it was provided, both in the order for a binder machine, and in the promissory notes given for the price of same, that the property in the machine was not to pass to the buyer until payment of the price in full, and that on default in payment of either of the notes the vendor should have the right to take posses-

(53) *Harris v. Dustin* 1 N.W.T. Rep. 6, 11 (part 4); *Richardson, Macleod, Rouleau and McGuire, JJ.* concurred with *Wetmore, J.*

(54) *Temple v. Nicholson* (1881) Cassels S.C. Dig. 116.

(55) *Cunningham v. Hedge* 12 App. Div. (N.Y.) 212, 42 N.Y. Supp. 549.

sion of and sell the machine, and the notes also contained a clause that the proceeds of sale should "be applied on the amount unpaid of the purchase price", it was held that the action of the vendors in re-taking the machine and selling it did not operate as a rescission of the contract. The inference from the contract is that the purchaser is to remain liable for the balance of the purchase price after the proceeds of the re-sale had been credited thereon, and not simply that the amount realized should be credited on the damages which the vendor would be entitled to recover against the vendee for breach of contract (56).

But if there be no agreement, express or implied, that the vendee shall be liable for any balance, the re-taking of the article by the vendors will constitute a rescission of the contract (57).

In Ontario, British Columbia, New Brunswick and Prince Edward Island, the bailor or conditional vendor re-taking possession for breach of condition must retain the goods for 20 days, in order that the bailee or his successor in interest, may redeem them within that time, a privilege which the statutes of each of those provinces declare may be exercised on payment of the full amount 'then in arrear', together with interest and the actual costs and expenses of taking possession (58).

In the North-West Territories the seller or bailor re-taking possession of the goods must retain the same in his possession for at least 20 days; i.e., 20 *clear* days; and the buyer, bailee, or any one claiming by or through or under him may 'redeem the same upon

(56) *Watson v. Sample* (1899) 12 Man. R. 373.

(57) *Sawyer v. Pringle*, 18 Ont. App. 218.

(58) R.S.O. 1897, c. 149, s. 8; R.S.B.C. 1897, c. 169, s. 28; Stat. N.B. 1899, c. 12, s. 6; Stat. P.E.I. 1896, c. 6, s. 4.

payment of the amount actually due thereon and the actual necessary expenses of taking possession' (59).

The word 'redeem' seems to be inapplicable to the recovery of the chattel by the bailee, even if the whole purchase price be in arrear, and although the payment made completes the sale and the right of property passes to him. It appears to be used in these statutes in the colloquial sense of obtaining back the possession and right of user of the chattel. The right will arise on the payment of the full amount *then* in arrear, i.e., at the time of the actual payment within the 20 day period, and may be demanded on payment of such instalments only, of the purchase price, as have become due, together with the costs and expenses.

Concurrent Remedies.—There may be a right of action, and the relation of debtor and creditor may exist for the price of goods, although the property has not passed, if the parties have made an agreement to that effect (60).

The law does not favour the enforcement of two remedies. It recognizes the right of a party to secure his claim by as many securities as he can get, but it does not recognize his right to enforce more than one to complete satisfaction. If, therefore, the right is not reserved to sue and collect the lien notes given for the price, notwithstanding the re-taking of possession by the vendors, such re-taking will preclude an action for the balance of the purchase price on the note, although the latter provides that upon default the vendors "may commence suit upon the same, which shall not be a waiver of the vendor's title to said property, and the same may be re-taken by them under this note or

(59) Con. Ord. N.W.T. 1898, c. 44, s. 7.

(60) *Waterous v. Wilson* 11 Man. R., at p. 295; *Kirchhoffer v. Clement*, 11 Man. R. 460.

"any of said notes upon default thereon as herein-before provided."

The contract is to be interpreted in such case as reserving the right to commence a suit, and as providing that the suit should not be a waiver of the vendors' right to take the property, but not as reserving any right of action *after* repossessing themselves of the property. The contract provided that in case of default and re-taking of possession "all payments made and amounts collected shall be deemed to be payments for the use, wear and tear of the said property up to the re-taking thereof." The vendors delayed for five months after default before they re-took possession and it was held that the fact that they did so so much later than the time at which their right accrued, was conclusive that they deemed the prior payments adequate for the use, wear and tear of the property up to that time, and that they treated the property as at that time of sufficient value to pay the balance of the claim (61).

If the vendor reserves a right to retake possession upon a hire-purchase contract and receives at the time that the contract is made a judgment bond executed by the conditional purchaser conditioned for the payment of the rental instalments and as collateral security therefor, he cannot enforce such bond after he has rescinded the sale by taking possession (62). But where the agreement gives the vendor the right both to take judgment on confession and to reclaim the property it would seem that the two remedies are not inconsistent, and the entry of judgment would not operate as a satisfaction, nor as an election of that remedy and surrender of title to the vendee; but even

(61) *Perkins v. Grobden* (1898) 39 L.R.A. 815 (Mich. Sup. Ct.)

(62) *Leonor v. McLaughlin* (1895) 32 L.R.A. 467, 165 Pa. 150.

then the judgment could not be enforced after the goods had been re-taken (63).

Where goods were sold at auction to be paid for by approved notes and were delivered, but the purchaser refused to give the notes, the sale and delivery were held to be conditional, but the vendor had the right on non-performance of the condition to treat the sale as an absolute one and to sue at once for the price if he so elected (64).

Rescission of Contract.—Ordinarily a conditional sale is rescinded if the vendors avail themselves of a power reserved by the contract to re-take or retain the goods under certain contingencies (65). If, however, the contract not only give the right to resume possession but to sell either with or without notice and to credit the proposed purchaser with the proceeds realized from the sale, leaving him expressly liable for any difference between that and the contract price, the contract will not be rescinded by the re-taking of possession and re-sale by the conditional vendors (66).

In *Sawyer v. Baskerville* (67) the defendants had signed a contract under seal agreeing to purchase from the plaintiffs certain machinery on credit, on the terms that the property in the machines should not pass from the vendors to the proposed purchasers until full payment of the price and any obligation given therefor, and the plaintiffs accepted the order and furnished the machinery as agreed. The defendants after a trial of the machinery rejected it and refused to give the

(63) *Durr v. Replogle* 167 Pa. 347; *Brewer v. Ford* 54 Hun, (N.Y.) 116.

(64) *Corlies v. Gardner* 2 Hall (N.Y.) 345.

(65) *White v. Smith* (1895) 28 N.S.R. 5.

(66) *Sawyer v. Pringle* (1891) 18 Ont. R. 222.

(67) *Sawyer v. Baskerville* (1891) 10 Man. R. 652.

promissory notes provided for in the contract. The plaintiffs then resumed possession of and sold the machinery and credited the proceeds on the original purchase money. They then filed a bill in equity to realize the balance of the purchase money out of the land described in the order upon which the defendants had given a charge for the indebtedness. The court held that the plaintiffs had themselves rescinded the contract, and that their remedy was limited to a claim for damages for refusing to accept and pay for the machinery; and that they had no right of action for the *price* of the same whether they kept the machinery or sold it, and as the charge was given upon the lands only to secure the purchase money it was no longer of any effect (68).

Re-sale.—Where the contract provides that the vendors shall retain the property in the article sold, and shall have the right to resume possession or resell, and charge all expenses against and recover the balance from the vendee, this does not, in the absence of any stipulation to that effect, give the vendors the right to re-sell without notice to the vendee or his assigns (69). That would be allowing them to fix the measure of damages or the amount of the balance by their own act without warning or notice to the party interested. Such a sale may be impeached by shewing that a greater sum could have been realized if it had been properly sold after proper notice (70). The vendor may, upon the vendee's default, exercise his

(68) *Sawyer v. Baskerville* (1891) 10 Man. R. 652; *Sawyer v. Pringle* 18 Ont. App. 218 followed; *McLean v. Dunn* 4 Bing. 772 distinguished.

(69) *Discher v. Canada Permanent* (1889) 18 Ont. R. 273.

(70) *Sands v. Taylor* 5 Johns. 395; *Discher v. Canada Permanent* (1889) 18 Ont. R. 273.

right to re-sell the property without first taking actual possession (71).

Special provision has been made by statute in the provinces of Ontario, British Columbia, New Brunswick and Prince Edward Island, for giving a notice of sale to the bailee or to his successor in interest, in case the bailor retakes possession. It applies only when the purchase price under the contract of conditional sale of the goods or chattels was originally more than \$30; in that case the goods may not be legally sold without 5 days' notice of the intended sale being first given to the bailee or his successor in interest. The notice may be personally served, or may, in the absence of the bailee or of his successor, as the case may be, be left at the residence or last-known place of abode in the province, or may be sent by registered letter deposited in the post office at least 7 days, i.e., 7 *clear* days (72) before the time when the said 5 days will elapse, such letter to be addressed to the bailee or his successor in interest at his last-known post-office address in Canada (73). The 5 days or the 7 days, as the case may be, may form a part of the 20 days allowed by law as the period of delay for which the bailor must retain the goods after taking possession before he sells them.

Re-registration on removal.—In the North-West Territories, if the goods forming the subject of a conditional sale are of the value of \$15 or over at the time of the bailment, and the same are removed from one registration district to another, the receipt note or

(71) *Hubbard v. Bliss*, 12 Allen (Mass.) 590.

(72) *Rumohr v. Marx*, 19 Can. Law Jour. 10; *R. v. Shropshire*, 8 A. & E. 173.

(73) R. S. O. 1897, c. 149, s. 9; R. S. B. C. 1897, c. 169, s. 29; Stat. N.B. 1899, c. 12, s. 7; Stat. P.E.I. 1896, c. 6, s. 5.

other writing evidencing the bailment must be re-registered within 30 days of the removal in the district to which the goods are removed (74).

Under the Nova Scotia law of 1899 (75) re-registration is required on a removal of the goods from one registration district to another, only where the removal is permanent, and where the conditional vendee (the grantor of the receipt note or hire receipt) is not a resident of Nova Scotia. A copy of the instrument and of the affidavits and documents relating thereto, certified under the hand of the Registrar in whose registry the same were first filed, within 2 months from the permanent removal, in the registry of deeds for the registration district to which the personal chattels are removed, and, if this is neglected, the instrument will become null and void as against creditors of, or bona-fide purchasers from the conditional vendee (76).

Renewal Statement. In the North-West Territories, the bailor must, in order to keep good the registration of his lien agreement, file with the registration clerk within 30 days next preceding the expiration of two years from the date of the original registration, a renewal statement, verified by affidavit, showing the amount still due to him for principal and interest, if any, and of all payments made on account, and whether and to what extent the condition of the bailment is still unperformed (77).

If it is desired to continue the registration for more than one year from filing of such renewal state-

(74) Con. Ord. N.W.T. 1898, c. 44, s. 2.

(75) N.S. Laws 1899, c. 28, s. 9.

(76) N.S. Laws 1899, c. 28, s. 9.

(77) Con. Ord. N.W.T. 1898, c. 44, s. 3.

ment, a similar statement must be sworn to and filed each year within the 30 days next preceding the expiration of a year from the filing of the last renewal statement (78).

In default of the filing in proper time of any renewal statement required by the statute, the seller or bailor will not be permitted to set up any right of property or right of possession in the goods as against the creditors of the buyer or bailee, or any purchaser or mortgagee from him in good faith for valuable consideration (79).

The renewal statement is made binding upon the conditional vendor as to any statement made by him or by his agent therein, and the goods are declared by the statute to be liable to redemption, upon payment of the amount actually 'due and owing' in respect thereof, or upon performance of the condition of the bailment by the buyer, bailee or any person claiming by, through or under him (80); and it is further declared by the Act that the seller or bailor will thereupon become divested of his property and right of possession, if any (81).

The intention of the Act seems to require that the words 'actually due and owing' should be construed disjunctively; the amount required to be paid before the vendor's right of property can be divested is not only the amount *actually due*, *i.e.*, accrued due and then in arrear, but any other amount *owing*, an intention which, perhaps, might have been better expressed had the word "or" been substituted for the word "and" in the phrase quoted.

(78) Sec. 3.

(79) Con. Ord. N.W.T. 1898, c. 44, s. 3.

(80) Sec. 5.

(81) *Ibid.*

If the seller or bailor, or his agent, makes any false statement in such a renewal statement, he becomes liable to a fine not exceeding \$100 on summary conviction (82).

Release and Waiver.—The mere taking of a promissory note for the purpose of closing an account is not conclusive that it was taken in payment so as to deprive the payees of the benefit of a conditional hire receipt under which they retained a lien on the chattel until fully paid for (83).

The discounting of notes given to him on a conditional sale is not a waiver of the vendor's right of property reserved to him under the contract (84).

By an agreement signed by one Johnson, he acknowledged the receipt of a piano on hire of \$6.00 per month of a piano valued at \$300, which he was to pay to the parties from whom he hired it, if it were destroyed or not returned to them on demand in good order. It was also agreed that he might purchase it for \$300 in two payments at future dates, but that, until payment of the whole purchase money, it was to remain their property on hire by him, and, on default in the punctual payment of any instalment or of the monthly rental, possession might be resumed. After a payment had been made on account of the purchase money, and the giving of a land mortgage as collateral security for the balance, but under which the rights of the conditional vendors under the agreement were reserved, the vendors replevied the piano, and it was held that they might legally do so (85).

(82) Con. Ord. N.W.T. 1898, c. 44, s. 4.

(83) *Nordheimer v. Robinson* 2 Ont. App. 35.

(84) *Mason v. Bickle* (1878) 2 Ont. App. 291, followed in *Hall Co. v. Hazlitt*, 7 Ont. App. 749.

(85) *Mason v. Johnson* 27 U.C.C.P. 208.

A. purchased goods from B. and gave an acceptance for the price. Across the end of the acceptance was printed the usual lien clause reserving property in the vendor till payment. The acceptance was not paid at maturity, and subsequent to maturity, A. sold the goods to C., who purchased for value without notice. After the sale to C., B. sued A. on his acceptance, recovered judgment and placed a *fi. fa* in the sheriff's hands, but nothing was realized on the execution. In an action by B. against C. for conversion, it was held that the recovery of judgment by B. against A. on the acceptance was an election to treat the contract completed, and passed the property, and that B. could not recover against C. (86).

Where a bicycle was the subject of a conditional sale and the buyer brought it back to the vendor for repair for which the buyer was to pay, it was held that the vendor by giving up the bicycle after it was repaired lost his lien for the price of the repairs, and that on his subsequently obtaining possession of the wheel upon the conditional sale contract, he could not hold it as well for the price of the repairs as for the balance of the purchase money (87).

(86) *Purtle v. Heney* 33 N.B.R. 607.

(87) *Bloch v. Dowd* (1897) 120 N.C.R. 402.

CHAPTER IV.

THE CONDITIONAL VENDEE.

Bailments.—Bailments were divided into six classes by Lord Holt in his exposition of the law on that subject contained in the leading case of *Coggs v. Bernard* (1). These classes are as follows:—

1. *Depositum*; or a naked bailment of goods, to be kept for the use of the bailor.

2. *Commodatum*; where goods or chattels that are useful are lent to the bailee *gratis* to be used by him.

3. *Locatio rei*; where goods are lent to the bailee to be used by him for hire.

4. *Vadium*; pawn.

5. *Locatio operis faciendi*; where goods are delivered to be carried, or something to be done about them, for a reward to be paid to the bailee.

6. *Mandatum*; a delivery of goods to somebody, who is to carry them, or do something about them, *gratis*.

Where the bailment is without reward, in order that the bailee may keep the goods for the bailor (*depositum*), the bailee is answerable only for his gross negligence, and not for any ordinary neglect (2). Whether there has been gross negligence is a question for the jury, and the fact that the bailee took the same care of the article as he did of similar goods of his own will not absolve him from liability, if the care he took was not such as a reasonable man would ordinarily take of his own (3).

(1) 2 Ld. Raym. 909; Smith's L.C., 10th ed. 167.

(2) *Coggs v. Bernard* 2 Ld. Raym. 909.

(3) *Doorman v. Jenkins* 2 A. & E. 256; *Giblin v. McMullen* L.R. 2 P.C. 317.

If, however, a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill will be imputable to him as gross negligence (4).

The failure to exercise reasonable care, skill and diligence, is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has; from a bailee for hire is reasonably expected care and diligence, such as are exercised in the ordinary and proper course of similar business to that in which he is engaged (5).

Where goods are lent to the bailee for hire (*locatio rei*), he is bound to use ordinary diligence, i.e., such as a prudent man would exercise towards his own (6).

A loan for hire may be determined by the owner if the bailee wrongfully sells the goods (7).

Gross negligence is the absence of that care which is ordinarily to be expected from the average man; not, however, the average man absolutely taken irrespectively of capacity and experience and forethought, but the average man with reference to the particular duties; and what the average man will do with reference to particular circumstances is a fluctuating quantity which has in each case to be determined (8). It is the determination of this within a wide range of possibilities that gives to the term "gross negligence" its apparent ambiguity, now bringing certain acts within

(4) *Shiells v. Blackburne*, 1 H. Bl. 158.

(5) *Beal v. South Devon Railway* 3 H. & C. 337; *Moffatt v. Bateman* L.R. 3 P.C. 115.

(6) *Dean v. Keate*, 3 Camp. 4.

(7) *Cooper v. Willomatt* 1 C.B. 672.

(8) *Beven on Negligence in Law*, 914.

its range now excluding them—arbitrarily at first sight, yet really determined by two factors, first, the nature of the confidence bestowed; secondly, the subject-matter with reference to which the confidence is bestowed (9).

Where the bailment is one of lending *gratis* (*Commodatum*) the bailee is bound to use great diligence in the protection of the thing bailed and will be responsible even for slight negligence; nor must he on any account deviate from the conditions of the loan (10); but if, while the goods are in the custody of the bailee they are injured by the negligence of a stranger and without any negligence on the part of the bailee, then the bailee is not liable to the bailor (11). Every bailee has a general right of action against mere wrongdoers to the property while in his possession, whether he has a special property therein or not, because he is answerable over to the bailor (12). Any person who has the legal possession of goods, though not the property, may maintain his action against the wrongdoer; for a mere wrongdoer cannot dispute the title of the party who is in possession of the goods, without any color of legal title (13).

Form of Contract.-- Delivery accompanied by a condition that title shall not pass until the fulfillment of a condition will not alone constitute a sale; it is a bailment which will ripen into a sale only on the fulfillment of the condition. An instrument in the following form signed by the conditional purchaser was held (14)

(9) *Ibid.*

(10) 1 Smith's L.C. 10th ed. 190; *Bringloe v. Morrice* 1 Mod. 210.

(11) *Claridge v. South Staffordshire* (1892) 1 Q.B. 422.

(12) Bacon's Abridgement.

(13) *Giles v. Grover* 6 Bligh, N.S. 436.

(14) *Wettlaufer v. Scott* (1893) 20 Ont. App. 652.

to be an "instrument evidencing the bailment" within the Ontario Conditional Sales Act which enacts that bailments by "receipt-notes, hire-receipts and orders for chattels" given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof, shall be valid as against subsequent bona fide purchasers for value without notice unless evidenced in writing signed by the bailee or his agent :

WOODSTOCK, ONT., OCT. 6, 1866.

"On or before the 1st day of July, 1891, for value received, I
 "promise to pay to George W., or bearer, at his office in S— the
 "sum of \$68 with interest at — per cent. per annum till due, and
 "one per cent. interest per month after due until paid.

"I further agree to furnish security satisfactory to you, at any
 "time if required. If I fail to furnish such security when demand-
 "ed, or if I make any default in payment, or should I dispose of
 "my landed property, you may then declare the whole price due
 "and payable, and suit therefor may be immediately entered, tried
 "and finally disposed of in the court having jurisdiction where the
 "head office of G. W— is located; and you may retake posses-
 "sion of the machine without process of law, and sell it by public
 "or private sale, to pay the unpaid balance of the price whether
 "due or not; but the taking and selling of said machine shall not
 "relieve me of any liability for any balance of the purchase price
 "still unpaid after such sale.

"Subject to the aforesaid provisions I am to have possession and
 "use of the machine at my own risk of damage or destruction from
 "any cause whatever, but the title thereto is not to pass to me until
 "full payment of the price or any obligation given therefor.

"These conditions and agreements are to continue in force until
 "the full payment of the price and interest is made.

"I hereby acknowledge having this day received a copy of this
 "note.

(Signed) D. M. S. —"

Where the vendor intended to sell and deliver the horse and to transfer the title to the buyer and to take back from him security for the payment of the note in the nature of a chattel mortgage, and a note was taken for the price with a stipulation underwritten signed by

the purchaser stating that the seller "holds the horse as her property until the note is paid," it was held that the case was not one of conditional sale and there was no effectual reservation of property (15).

It would seem that a conditional sale contract for a waggon and a pair of bob-sleighs will be sufficiently "evidenced in writing signed by the bailee" if the latter signs lien notes for the purchase money upon lien note forms prepared for use on the sale of agricultural implements, and which refer to the article which is the subject of the bailment as "the machine" (16).

No special form of words are necessary to reserve the title in the chattel to the conditional vendor so long as the written agreement shows an intention of the parties that the property should not pass until full payment of the price.

The transaction frequently takes the form of a 'lien note' signed by the conditional purchaser, a document in the form of a promissory note payable to the vendors or order, but having an additional clause added as to the right of property. A common form of this reservation clause on sales of agricultural instruments is as follows:—"The title and right to the "possession of the property for which this note is "given shall remain in the A—— Company until this "note or any renewal thereof is paid, and should I sell "or dispose of my land or personal property all payments shall be due and payable even before maturity "of same, and the A—— Company may take possession of the property."

Where the chattels consist of household goods a 'receipt-note,' or memorandum of the contract is more commonly used. This is also signed by the purchaser.

(15) *Wait v. Green* 36 N.Y. 556; explained in *Ballard v. Burgett*, 40 N.Y., 314.

(16) *Wettlaufer v. Scott* (1893) 20 Ont. App. 652.

and a copy of same delivered to him. A form of a weekly payment contract is as follows :—

This certifies that I have purchased from The B..... Furniture Company (Limited), goods as per invoice endorsed hereon or attached hereto, on the terms following; and for which I agree to pay \$.... as follows: \$.... cash down and balance in weekly payments of \$.... each, from the date hereof.

It is expressly agreed that the property in and title to said goods and to all other goods which are included in the subject of contracts which have been heretofore made, or may hereafter be made by me with the said company, shall not pass from the company until the said sum of \$.... is fully paid, and all the dues, terms and conditions of this and other said contracts shall have been fully complied with. The company may pay any rent and taxes due on premises where said goods may be and such sums shall be forthwith payable by me to them. On default in any of the above payments, or if goods shall be seized for rent or taxes, or if the rent of premises where goods are shall be overdue, or if I shall abandon, dispose, or attempt to dispose of the same, or remove them from number street in the city of without permission, the whole sum agreed to be paid shall immediately become due and payable and my right to possession of said goods shall cease, and all payments shall be forfeited to the company as reasonable compensation for injury to and use of said goods and expense and trouble in regard to same, and the company or its agents may, without legal process, enter upon any premises and take possession and remove said goods at any time during the day or night, without being liable for any manner of trespass. And at the said company's option upon such seizure the said company may either retain the goods, and the payments made thereon shall be forfeited as above set forth; or the said company may sell the said goods by private sale, or otherwise, without any notice to me, and may forthwith recover from me the balance of amount I herein agree to pay together with expenses of seizure and sale, after giving credit for proceeds of sale, or the said company may have said goods valued and retain same and may then forthwith recover from me balance of said amount agreed to be paid together with expenses of seizure and valuation, after giving credit with amount of said valuation. Should the company take possession of said goods I shall have right to redeem same at any time within 20 days thereafter, only upon paying full balance of price, together with any amount paid by company hereunder, and all charges and expenses incurred by reason of taking possession aforesaid. In the event of seizure for rent I hereby authorize the said company on my behalf to claim any of said goods as exempt by law from distress. Any promissory notes or other securities given by me at any time shall be collateral only hereto, and proceedings may be taken thereon without in any way affecting or prejudicing this agreement.

And it is hereby agreed that I having purchased other goods

under contracts from the company, the company agree that so long as I pay \$... to them that I shall not be required to pay more. But in default in any of said payment all payments provided for by said contracts shall immediately become due and payable. All payments made by me on this or any other contract may be applied and appropriated by the company at any time upon any contracts between us in such manner as they please, any directions of mine to the contrary notwithstanding. Nothing herein shall affect the provisions of any of said contracts, save as to the payments aforesaid.

Dated at, the day of, 189...

Signed in the presence of

.....

The following form is specially applicable to the conditional sale of a piano:—

Received from Messrs. A. & B. aoctave,.....finish, upright piano, number, make, on hire at dollars per month, payable in advance, the said pianoforte being valued at dollars, which sum I agree to pay in the event of the said instrument being injured, destroyed, or not being returned to Messrs. A. & B. on demand, free of expense, in good order, reasonable wear excepted.

It is agreed that I may purchase the said pianoforte for the sum of dollars, payable as follows, and interest on unpaid principal at 6 per cent. per annum from date of agreement. But, until the whole of the purchase money be paid, the said pianoforte shall remain the property of Messrs. A. & B., on hire by me, and shall not be removed from the premises where now delivered, nor shall any attempt be made to remove the instrument without the written consent of A. & B. And in default of the punctual payment of any instalment of the said purchase money, at the times above stated respectively, or at any time or times to which the payment thereof, or any part thereof, may hereafter be extended, or of the said monthly rental in advance, Messrs. A. & B., or their agents, may, without rendering themselves liable to any action or actions for so doing, enter upon the premises where the said pianoforte may be, and resume possession thereof without any previous demand, although a part of the purchase money may have been paid, or a note or notes, draft or drafts, given on account thereof, and although the same may be then outstanding under discount, this agreement for sale being conditional, and punctual payment being essential to it; but in the event of the said pianoforte being so assumed by them, and being returned in good order, any sum received on account of the purchase money, beyond the amount due for rent, and any expenses incurred in reference to the said instrument or payments hereunder, is to be repaid to me, and any notes or drafts received on account of the purchase money are to be

returned to me at maturity. On payment in full of purchase money and interest, no rent or hire is to be charged to me.

It is further agreed that this receipt and agreement embodies the whole of the agreement between myself and Messrs. A. & B. with respect to said pianoforte, and I hereby waive all verbal agreements not embodied herein, and agree that I am not entitled to receive credit at any time for any moneys which may be received by Messrs. A. & B. by the discount of any of the notes or drafts which may have been taken by them on account of said purchase money.

Signature.....

Address.....

I hereby certify that the piano which I have received from Messrs. A. & B. has their name and address labelled and printed upon it, and I also acknowledge to have this day received a copy of the within agreement.

Date..... Signature.....

Contract form signed and sealed by proposed purchaser.—A contract agreement sealed and delivered by only one party which is subject to the approval of the other party cannot be revoked by the former before the latter has had a reasonable time within which to signify his assent (16). A promise made by deed is at once binding and irrevocable. The ordinary rules of proposal and acceptance do not apply to promises made by deed. The promise creates an obligation which whenever it comes to the knowledge of the other party affords a cause of action without any other signification of his assent, and in the meantime it is irrevocable. But if the promisee refuses his assent when the promise comes to his knowledge, the contract is avoided (17). So where a contract form was executed under seal by the person giving the order for an engine to be shipped to him, but was expressed to be subject to the approval of the company, the other party thereto, the signature being obtained

(16) *Waterous v. Pratt* (1899) 30 Ont. R. 538.

(17) *Xenos v. Wickham* (1886) L.R. 2 H.L. 296, 323; Pollock on Contracts, 6th ed. 7, 47.

by the latter's agent, who forwarded the same to the company, it was held that the party so signing had no right to cancel the contract twelve days later, although it was not shewn that the work had been theretofore begun on the engine, which had to be specially built (18).

Bailee's care of chattel. The obligation to take reasonable care of the thing entrusted to a bailee upon a hiring involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the chattel may be reasonably safe in it (19). But where a shed was blown down by a high wind and the chattel therein, the subject of the bailment, was injured in consequence, it was held that the bailee, who had employed a careful and experienced person to build the shed, was not liable for negligence on its being shewn that he had no knowledge of any negligence on the part of the contractor (20).

A misuser of property entrusted to a bailee is not necessarily a conversion of it; a distinction is to be drawn between those acts which are altogether repugnant to the bailment (which are equivalent to the conversion), and those acts which, though unauthorized, are not so repugnant as by their mere existence to operate as a disclaimer and a determination of the holding (21).

Under an agreement of hire purchase, the hirer may contract to keep and preserve the chattel from injury, including damage by fire, and to keep the chattel in the hirer's own custody at a stated address.

(18) *Waterous v. Pratt* (1899) 30 Ont. R. 538.

(19) *Beven on Negligence* (1895) 957.

(20) *Searle v. Laverick* L.R. 9 Q.B. 122.

(21) *Donald v. Suckling* L.R. 1 Q.B. 585, 615.

and not to remove the same, or permit or suffer the same to be removed without the owner's previous consent in writing (22).

If the hirer of goods under a hire-purchase agreement wrongfully sells them, or otherwise parts with them, the owner may treat the hiring as thereby determined, (23), and the owner may sue the purchaser or receiver for their conversion, unless the latter has purchased subject to and acknowledging the owner's right of property (24).

Unless by the contract a larger measure of responsibility is taken by the hirer of a chattel, he is required to use no more than that degree of diligence which prudent men use, that is, which the generality of men use, in keeping their own goods of the same kind, and if a boiler and engine hired be destroyed by an explosion not attributable to any negligence of the hirer, the latter is relieved from the performance of his promise to return the article, and the contract of hiring is dissolved (25).

Rescission on Default of Conditional Vendor.—If the vendor makes default in fulfilling his contract the vendee may become entitled to rescind it, and to recover the payments he has made. So where a sewing machine was contracted to be conditionally sold, but instead of the kind selected a different machine was delivered to the vendee, and on its proving unsatisfactory the vendor promised to replace it by another but failed to do so, and the vendor replevied

(22) *Helby v. Matthews* (1895) A.C. 471.

(23) *Fenn v. Bittlestone* 7 Exch. 152; *Bryant v. Wardell* 2 Exch. 479.

(24) *Cooper v. Willomatt* 1 C.B. 672; *Loeschman v. Machin* 2 Stark. 311; Ex. p. *Leslie* 20 Ch. D. 131.

(25) *Reynolds v. Roxburgh* (1886) 10 Ont. R. 649.

the machine delivered, it was held that the vendee who had ceased paying any instalments, upon the vendor's default, was entitled to recover back the payments he had made (26).

Where title is reserved to the vendor with the right to retake possession on the vendee's default, the vendee cannot by returning, or offering to return the property, relieve himself of the liability for the price. The option is the vendor's, and the vendee has no option to return the property on his own default (27).

The conditional vendee cannot have the contract rescinded for fraudulent misrepresentation if, after discovering same, he neither disaffirms the contract nor offers to return the chattel (28).

Breach of Warranty. A *completed* sale of chattels cannot be rescinded for breach of warranty and there is no jurisdiction to order re-delivery of the chattel (29).

In an action between vendor and purchaser for the price of a machine sold under a conditional sale, the purchaser may shew that the machine was not as warranted and so reduce the claim by the difference between the value of the machine as warranted and its actual value (30).

Where the property has not passed to the buyer he may reject the goods if they do not correspond in quality with the warranty, but it seems that there can

(26) *Howe Machine Co. v. Willie* 85 Ill. 333.

(27) *Appleton v. Norwalk* 53 Conn. 4; *Beach's Appeal* 58 Conn. 464; *Fleury v. Tufts* 25 Ill. App. 101.

(28) *Frye v. Milligan* (1885) 10 Ont. R. 509; *Tomlinson v. Morris* 12 Ont. R. 311.

(29) *Hamilton Mfg. Co. v. Knight* (1898) 5 B.C.R. 391.

(30) *Tomlinson v. Morris* 12 Ont. R. 311; *Cull v. Roberts* (1898) 28 Ont. R. 591.

be no recovery of damages for breach of an implied warranty until the property has passed (31).

The vendee, on discovering the breach of warranty, may return the article if the discovery be made within a reasonable time after its receipt; or if the facts warrant he may bring an action for deceit, in which it must be shewn, either that the defendant did not believe the statements made to be true, or that the same were made recklessly. Otherwise the vendee must first pay for the article and then bring her action for the breach of warranty, or, possibly, plead the breach in answer to an action for the price (32).

A company in 1893 sold a hay press upon credit, and upon the terms that the property should remain in them until payment. The contract was properly filed under s. 6 of 51 V., c. 19, now s. 3 of R.S.O., c. 149. A few months afterwards the purchaser resold the press to S., who had no knowledge of the facts, and was told that it was paid for and free from any lien. After S. had used it for nearly four years, during which the original purchaser had made some small payments on account, the company seized it in S.'s possession under the terms of the contract. It was then held that S. was entitled to recover from his vendor upon a warranty of title, which he proved, the value of the press and the sum he would have received beyond expenses upon contracts actually made to press hay with the press in question, and which he was in course of executing at the time of the seizure, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale (33).

(31) *Frye v. Mulligan* (1885) 10 Ont. R. 509.

(32) *Frye v. Milligan* (1885) 10 Ont. R. 509; *Joliffe v. Baker* 11 Q.B.D. 255.

(33) *Sheard v. Horan* (1899) 30 Ont. R. 618, 35 C.L.J. 417 (Street, J.); *The Argentine* 14 App. Cas. 519; *Cory v. Thomas Iron Works Co.* L.R. 3 Q.B. 181; and *Mullett v. Mason* L.R. 1 C.P. 559 followed.

In a recent Manitoba case the defendant gave plaintiffs a written order for a second-hand horse power and threshing machine, "the same to be put in good running order . . . by putting in a set of cylinder spikes." The price was to be \$250. After the acceptance of the order and the delivery of the machine, the set of cylinder spikes was put in, and plaintiffs' agent made several attempts to put the machinery into good running order, but defendant claimed the condition was broken and returned the machine. Plaintiffs then sued for the price agreed on. It was held that the condition of the sale was not satisfied by the putting in of the new spikes, but that plaintiffs were bound to put the machine into good running order (34).

In Manitoba it is held that an action will lie for breach of warranty before the property has passed and that the cause of action arises at once just as in the case of an absolute sale (35). In *Copeland v. Hamilton* (36) the condition of the agreement was that the property in the horse, the subject of the contract, was not to pass to defendant until payment. The plaintiff had sued upon a promissory note given to him by defendant under the agreement for the sale. Defendant filed a counter-claim for breach of an alleged warranty that the horse was sound. The horse was delivered to the defendant and used by him for some time, but died before the note was due, from a cause not connected with the unsoundness complained of. The warranty was proved and a verdict for the defendant on his counter-claim was upheld for the difference between the value of the horse as it was when delivered, and what its value would then have been if sound. It was there held that the warranty being of soundness

(34) *Abell v. Craig* (1898) 34 C.L.J. 473.

(35) *Copeland v. Hamilton* (1893) 9 Man. R. 143.

(36) 9 Man. R. 143.

at the making of the agreement, not at the date of the maturity of the note, and the unsoundness being such as to impair the usefulness of the horse from the time of its delivery to the defendant, there was then an immediate breach of the warranty and immediate damage and right of action therefor to the defendant; and that the principle of decision in such a case must be the same whether the subject of the sale remains in existence or not (37). Mr. Justice Killam said in his judgment: "The defendant is absolutely bound upon his note. If the article sold be wholly destroyed so as to be incapable of sale when the note is paid, the defendant would suffer no further damage, and then, according to the argument for the plaintiff, he could never have a cause of action for the greater part of his claim. Even if as in the Ontario cases (38) there were an express right to re-sell upon default and credit the purchaser with the proceeds, these proceeds could not be expected to be as large as if the article were as warranted. . . . The purchaser should recover as general damages for the period of the bailment and for the proposed sale together, the same amount as if there were an immediate sale. The consideration for the note is in part the bailment, and in part the promise of the vendor to sell. This latter promise is worth less than if the article sold were as warranted. To treat the matter upon the principle of the plaintiffs' contention would seem to involve the liability of the purchaser for the whole purchase money, while precluding him, forever in many instances, from a right to recover for defects warranted against" (39). If the purchaser of a

(37) *Copeland v. Hamilton* (1893) 9 Man. R. 143.

(38) *Frye v. Milligan* 10 Ont. R. 509; *Tomlinson v. Morris* 12 Ont. R. 311.

(39) *Copeland v. Hamilton* (1893) 9 Man. R. 143, 146 (Killam J.); *Frye v. Milligan* 10 Ont. R. 509 and *Tomlinson v. Morris* 12 Ont. R. 311 disapproved.

machine sold under a warranty providing for a three days' test thereof to ascertain its ability to fulfil the warranty, with a provision that the time may be extended by mutual consent, after testing it accepts it with a change in its arrangement, relying on his own judgment that with such change it will suit his purpose he will be liable for the purchase price (40).

Tenant's Fixtures.—As it frequently happens that a tenant sells out his chattels, including trade fixtures, upon a conditional sale agreement, it is important to consider the right of removal of such fixtures as between the landlord and the tenant.

A trade fixture *owned* by the tenant and attached to the freehold becomes a part of the freehold, subject to the right of the tenant to remove it if he does so in proper time (41); but if the parties make a special contract in variance of this rule, the contract will govern (42).

The right of a tenant to remove his trade fixtures is so far connected with the land that it may be deemed a right or interest in it, and, if the tenant transfers the right to another person, a subsequent voluntary act of surrender of the premises before the expiry of his term will not defeat the purchaser's right to enter and remove them. As regards strangers who were not parties or privies to the surrender, the estate surrendered will in law be deemed to continue (43).

The right must be exercised prior to the determination of his tenancy; and he cannot, after quitting the premises and giving up the key, re-enter to sever

(40) *Hutches v. J. L. Case Threshing Mach. Co.* (Tex. Civ. App.) 35 S.W. 60.

(41) *Meux v. Jacobs* L.R. 7 H.L. 490.

(42) *Dancy v. Lewis* 18 U.C.R. 30.

(43) *London & Westminster v. Drake* 6 C.B.N.S. 798.

and remove the fixtures. If, however, the tenant has, with the consent of the landlord, remained in possession after the expiry of the term, and he actually severs and removes the fixtures during the *continuance of his lawful possession*, the tenant is entitled to them, and they do not become the property of the landlord (44); and he may, after such removal, lawfully contract for a conditional sale of them. The right may be exercised by the tenant, notwithstanding the fact that he has committed an act of forfeiture of the lease, if he removes his fixtures before judgment in ejectment has been obtained against them (45). The tenant has no right to remove his fixtures during the time in which he is wrongfully holding over (46).

When not removed during the continuance of the tenancy, the tenant's fixtures become on its expiration part of the freehold, even though they are on the premises by the parol consent of the lessor; and although such consent might give the tenant a right of action for the value of the fixtures against the lessor if he refused to permit their removal, it will give no right to enforce their removal or to recover damages against the mortgagees of the realty (47).

If the lessor elects to re-enter for a forfeiture, the lessee has the right, while he remains in possession, to remove fixtures put up by him for the purposes of his trade, and he will be allowed a reasonable time after such election, within which to do so (48).

(44) *Dewar v. Mallory* 27 Gr. (Ont.) 303; *Prougney v. Gurney* 36 U.C.R. 53, 37 U.C.R. 347.

(45) *Pugh v. Arton* L.R. 8 Ex. 626.

(46) *Leader v. Homewood* 5 C.B.N.S. 546; *Roffey v. Henderson* 17 Q.B. 574; *Heap v. Barton* 12 C.B. 274.

(47) *Thomas v. Jennings* 75 L.T. Rep. 274.

(48) *Argles v. McMath* 23 Ont. App. 44, *affirming* 26 Ont. R. 224.

A lease provided that the lessees might, during the term, erect machinery upon the premises, and that such machinery might be removed by them, but not so as to injure the building. The lessee affixed the machinery, and some time afterwards made an assignment of his property and effects for the benefit of creditors. The lessors then elected to forfeit the term under a clause in the lease, giving them that privilege in case the tenant made an assignment for creditors, but they permitted a person who had purchased the machinery from the assignee for creditors to remain in possession of the premises, and received rent from such purchaser until the latter vacated the premises, leaving the machinery there. It was held that, under the provisions of the lease, the machinery continued to be chattel property, although affixed, and that the same passed as chattels to the assignee for creditors, and from him to such purchaser, and that the forfeiture of the term did not affect the right to the property nor the right to remove it (49).

Effect of Re-taking the Chattel. If the property in the goods passes at the time of the contract to the vendee, but a right of re-sale is reserved in default of payment, then the vendee, on the default happening and the right being exercised, remains liable for the unpaid price, or damages equal to the unpaid price in an action for not accepting and paying for the goods (50).

The distinction between such a case and one of conditional sale is that the vendor in the latter is dealing with his own property, and in the former he is dealing with goods which are no longer his but his vendee's; and if the sale is wrongful, the vendee has his action for conversion of the property. But the

(49) *Searth v. Ontario Power and Flat Co.* 24 Ont. R. 446.

(50) *Lamond v. Davall* 9 Q.B. 1030.

conditional vendee to whom no property has passed can have no such action; and if the vendor resumes possession and elects to re-sell, the conditional vendee may treat the same as an abandonment of the original contract by his vendor (51).

If provision is made in the contract for resuming possession in case of default and for selling the machinery, but it does *not* further provide that the purchase money is to be applied *pro tanto* on what is due, and that the purchasers are to remain liable for the difference, then the re-sale of the machinery by the vendors deprives them of their claim for any part of the price as against the conditional purchaser; and a judgment recovered by the vendors before such re-sale upon notes given for the price cannot be enforced afterwards (52).

A promise to extend the time for payment of an instalment due on a conditional sale or lease of goods has been held to be a waiver of forfeiture for default which will prevent asserting it before the expiration of the extended time (53).

The vendee cannot recover from the vendor payments made by him which were stipulated to be retained by the vendor as compensation for the use of the article in case of default, if it appears that the payments do not amount to an unreasonable compensation (54).

Jus tertii. The bailee can only set up the title of another, if he defends upon the right and title and by

(51) *Sawyer v. Pringle* (1861) 18 Ont. App. 218.

(52) *Arnold v. Playter, Watrous Co.'s Claim* (1862) 22 Ont. R. 608.

(53) *Cole v. Hines* (Md.) 32 L.R.A. 455.

(54) *Wheeler v. Jacobs* 2 Misc. Rep. (N.Y.) 230.

the authority of that person (55). Where the true owner has by legal proceedings compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery on account of the bailor (56).

An actual delivery to the true owner having a right to the possession on his demand is a justification for the bailee. The bailee's contract is to do with the property committed to him what his principal has directed, to restore it or to account for it; and by yielding to title paramount, he does account for it (57).

But a bailee cannot avail himself of the *jus tertii* for the purpose of keeping the property for himself, even though the title he sets up is that of the true owner (58).

Registration of Discharge - N.W.T.—By an Ordinance passed in 1897 (59), now chapter 44 of the Consolidated Ordinances of 1898, it is enacted that the seller or bailor shall, upon payment or tender of the amount due in respect of such goods or performance of the conditions of the bailment, sign and deliver to any person demanding it a memorandum in writing, stating that his claims against the goods are satisfied, and such memorandum shall thereupon operate to divest the seller or bailor of any further interest or right of possession, if any, in the goods (60).

(55) *Biddle v. Bond* 6 B. & S. 225; *Kingsman v. Kingsman* 6 Q.B.D. 122; *Rogers v. Lambert* (1891) 1 Q.B. 318.

(56) *Watson v. Anderton* 1 B. & Ad. 456.

(57) *Cheeseman v. Exall* 6 Ex. 341; Beven on Negligence, 918.

(58) Beven on Negligence, 918 (n).

(59) No. 39 of 1897, s. 6.

(60) Con. Ord. N.W.T. 1898, c. 44, s. 6.

Such a memorandum may be registered in the proper office for registration of conditional sale agreements, if its execution is proved by the affidavit of an attesting witness (61).

Assault during Seizure of Chattels. If the conditional purchaser or any other person be assaulted by the bailiff or employee sent by the vendor to re-take possession of the chattels, the vendor as well as the assaulting party may be responsible in damages therefor, if the assaulting party were acting in the ordinary course of his employment with the intention of doing what he was employed to do, and not for purposes of his own. An act done by an agent may be so criminal that no jury would say that it could have been done in furtherance of his master's business; but if an agent who was authorized to do a thing properly, while acting within the scope of his authority, exceeds his authority by doing the thing improperly, the mere fact of the excess of authority, involving a criminal act, does not relieve the master from liability (62).

If a charge of assault or battery is preferred by or on behalf of the person aggrieved, and is tried summarily before a justice of the peace upon a hearing upon the merits, the payment of the fine or the undergoing of the sentence imposed will release the person convicted from any civil proceedings for the same cause (63); and if the accused is acquitted upon a summary hearing upon a complaint similarly laid 'by or on behalf of the person aggrieved,' the magistrate's

(61) Sec. 6.

(62) *Dyer v. Munday* (1895) 1 Q.B. 742, 64 L.J.Q.B. 448.

(63) Criminal Code (Can.) sec. 866; *Nevills v. Ballard* 1 Can. Cr. Cas. 434; *Hardigan v. Graham* 1 Can. Cr. Cas. 437; *Miller v. Lea* 2 Can. Cr. Cas. 282.

certificate of dismissal will bar a claim for damages set up in a civil action (64).

But it would seem that the summary conviction of the bailiff for an assault committed while forcibly removing goods under a conditional sale agreement, and the payment of the fine imposed will not relieve the employer from his liability to pay damages for the bailiff's wrongful act committed in furtherance of the employer's business, and while acting within the scope of the employment (65).

Criminal Proceedings against Conditional Vendee.

—The statutory offence of theft is committed by a bailee who fraudulently and without colour of right converts the chattels to his own use or the use of any person other than the owner (*a*) with intent to deprive the owner or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest; or (*b*) with intent to pledge the chattel or to deposit it as security; or (*c*) with intent to part with it under a condition as to its return, which the person parting with it may be unable to perform; or (*d*) with intent to deal with the chattel in such a manner that it cannot be restored in the condition in which it was at the time of the conversion (66).

The offence is complete, notwithstanding that the chattel was at the time of the conversion in the lawful possession of the person converting (67).

(64) Criminal Code (Can.) sec. 866.

(65) *Dyer v. Munday* (1895) 1 Q.B. 742.

(66) Criminal Code, sec. 305.

(67) Cr. Code (Can.) 305 (3).

CHAPTER V.

RIGHTS OF THIRD PARTIES REGARDING CONDITIONAL SALES.

Wrongful sale by conditional vendee. At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception when the person in possession had a title defeasible on account of fraud. But the general rule was, that to make either a sale or pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledger had authority from the owner to sell or pledge, as the case may be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded as against those who were induced *bona fide* to act on the faith of that apparent authority, and the result as to them was the same as if he had really given it (1).

And where hides had been sent to a tanner near Montreal to be tanned and re-shipped to the owner in England, and the consignee, who in the course of his business purchased hides and manufactured leather out of them, pledged the hides so consigned for tanning, it was held that the pledgee had no title against the true owner, and was liable for the value of the hides which had been sold, although the advance had been made in good faith to the tanner (2).

(1) *Cole v. N. Western Bank* L.R. 10 C.P. 354, per Blackburn, J., followed in *Forristal v. McDonald* (1883) 9 Can. S.C.R. 12.

(2) *City Bank v. Barrow* 5 App. Cas. 664.

A person in whose possession an article has been placed under a contract of conditional sale reserving property in the vendor, cannot, apart from statutory provisions, such as are contained in the Conditional Sales Act, give a title to a third party as against the conditional vendor or bailor (3).

Ordinarily, a *bona fide* purchaser, from the condition of vendee, acquires no better title than such vendee has (4).

If the hirer of goods wrongfully sell or otherwise part with them, the owner may treat the hiring as terminated (5); and, except where by statute the purchaser from the hirer has acquired a right of retention because of non-compliance with statutory provision for registration of the hire agreement, or otherwise, the original owner of the goods may sue the purchaser for their conversion (6).

Where a person hired a sewing machine under a hire-purchase agreement and then pawned it, the owner was held entitled to recover the machine from the pawnbroker (7).

An auctioneer who receives goods against which there is a conditional sale lien by which the property is reserved to the vendor, and who sells the same under instructions from the conditional vendee, is liable to the real owner for damages for the conversion of

(3) *Harkness v. Russell* 118 U.S. 663; *Stevenson v. Rice* 24 U.C.C.P. 245; *Mason v. Johnson* 27 U.C.C.P. 208; *Tuffts v. Mottashed* 29 U.C.C.P. 539; *Mason v. Bickle* 2 Ont. App. 291; *Nordheimer v. Robinson* 2 Ont. App. 305.

(4) *Boyce v. McDonald* (1893) 9 Man. R. 297; *Ballard v. Burgett* 40 N.Y. 314 approved.

(5) *Fenn v. Bittleston* 7 Exch. 152; *Bryant v. Wardell* 2 Exch. 479.

(6) *Cooper v. Willomatt* 1 C.B. 672; *Loeschman v. Machin* 2 Stark. 311.

(7) *Singer Mfg. Co. v. Clark* 5 Ex. D. 37.

the goods, although he did so believing in good faith that the person from whom he received them was the owner (8).

In a recent Ontario case (9) the facts were, that the conditional vendee made an absolute sale of a hay press to a third party, who purchased in good faith, the person from whom he bought having represented to him that it was paid for and free from any lien, and the conditional vendee continued for some time afterwards to make small payments to the original vendors. When these payments were discontinued, the original vendors first became aware that their vendee was no longer in possession of the hay press, and they seized it in the possession of the third party. The latter sued the original vendors and also the conditional vendee from whom he had bought, alleging as to the latter an express warranty of title. The contract having been duly filed under the Ontario Conditional Sales Act, the action was dismissed as to the original vendors, but judgment was awarded against the conditional vendee for breach of warranty of title. In assessing the damages with respect to the latter, it was held that it was proper to allow the plaintiff not only the value of the hay press but also the sum he would have received beyond expenses upon contracts, actually made and in force at the time of the seizure, to press hay with that particular hay press and in which he was in course of executing at the time of the seizure, because the conditional vendee knew when he sold to the plaintiff that the press was to be used for the purpose of pressing the hay of different farmers by the plaintiff for profit, and that arrangements would be made with them in advance (10).

(8) *Cochrane v. Rymill* 27 W.R. 776; *Delaney v. Wallis* 14 L.R. Ir. 31.

(9) *Sheard v. Horan* (1899) 30 Ont. R. 618.

(10) *Sheard v. Horan* (1899) 30 Ont. R. 618; *The Argentino* (1889) 14 App. Cas. 519.

Affixing name and address to chattel.—Where the fact that the manufacturer's or bailor's name and address had been painted, printed, stamped, engraved or attached to the chattel, is relied on as a compliance with a conditional sale law, the plain intention of the Acts of the various provinces in which that method is permitted seems to be that the painting or stamping, etc., shall be done in such a manner as would attract the attention of a probable purchaser when inspecting the chattel, and that the name and address should be placed on the chattel in a permanent way. The statutes require that the name be *plainly* attached no matter which of the methods prescribed is adopted. It is therefore submitted that to affix the name and address by stamping the same on the chattel with ink easily erased, or to affix the name in an obscure part of the chattel, where no one would be likely to look for it, or to print or stamp the name in unreasonably small characters, taking into consideration the nature of the chattel, would not be a compliance with the Act as against a bona-fide purchaser or mortgagee who examined the article, but, by reason of the circumstances mentioned, found no name or address thereon. What is a reasonable affixing of the vendor's name and address must depend upon the size and nature of the chattel.

The time at which the statute makes it imperative that the conditional vendor's name and address must be on the chattel is the time when possession is given to the bailee (11).

The bailor's duty as to the name and address, if then complied with, is not a continuing one, and he is not bound to prevent the bailee from obliterating the name stamped or painted on the article sold, or to exercise any control over it in that respect during the

(11) R.S.O. 1897, c. 149, s. 1.

bailment (12); and the lien is not lost if, without the vendor's direction or connivance, the conditional purchaser paints out or obliterates the name and address of the vendor, which, at the time possession was given to the bailee, appeared on the chattel either by being painted thereon or otherwise plainly attached thereto (13).

Vendor's non-compliance with statute—Rights of subsequent purchasers. In the provinces of Ontario, British Columbia, New Brunswick and Prince Edward Island the non-compliance with the requirements of the Conditional Sales statute invalidates the condition of the bailment whereby the conditional vendor reserves the property and title to the chattel, and under which he might retake possession of same, *as against* subsequent purchasers or mortgagees without notice, in good faith for valuable consideration (14).

The vendor's title is displaced only to the extent which is necessary to give effect to the claim of the purchaser or mortgagee (15), and in the case of a mortgagee the conditional vendor is entitled to any benefits remaining after the mortgagee's claim is satisfied. (16).

Subsequent purchasers without notice in good faith for valuable consideration.—A conditional sale agreement, under sec. 41 of the Ontario Bills of Sale Act, for the sale or transfer of 'merchandise' to a trader or other person for the purpose of re-sale by him in the

(12) *Wettlaufer v. Scott* (1893) 20 Ont. App. 652.

(13) *Wettlaufer v. Scott* (1893) 20 Ont. App. 652.

(14) R.S.O. 1897, c. 149, s. 1; R.S.B.C. 1897, c. 169, s. 24; Stat. N.B. 1899, c. 12, s. 1; Stat. P.E.I. 1896, c. 6, s. 1.

(15) *Ex p. Blaiberg*, 23 Ch. D. 254, 258.

(16) *Re Artistic Color Co.* 21 Ch. D. 510.

course of business, but reserving the title or ownership to the vendor, will not affect purchases from such trader or person which are made in the usual course of business (17).

By the Ontario Factors' Act (18) any person may contract for the purchase of goods with any *agent* entrusted with the possession thereof, or to whom the same may be consigned, and may receive and pay for the same to such agent; and such contract and payment shall be binding upon the owner of the goods notwithstanding the purchaser has notice that he is contracting only with an agent.

It is also enacted that the consideration necessary for the validity of a purchase from an agent entrusted with the possession of goods may be either a payment in cash or the delivery or transfer of other goods, or in part cash and in part the delivery or transfer of other goods (19).

To constitute a person an "agent" under that Act, his employment must correspond to that of some known kind of commercial agent like the class of factors. If not such a person, a pledgee from him could not successfully set up that the pledgor was an "agent entrusted with the possession of goods" empowered by the Factors' Act to pledge them. (20)

The agent's business must be of that class which, like the business of a factor, when carried to its legitimate result, would properly end in selling or receiving payment for goods. If such a person is 'entrusted,' and is entrusted *in that capacity*, then in the absence

(17) R.S.O. 1897, c. 148, s. 41 (3).

(18) R.S.O. 1897, c. 150, s. 5.

(19) R.S.O. 1897, c. 150, s. 5.

(20) *Bush v. Fry* (1888) 15 Ont. R. 122.

of bad faith on the part of the pledgee, the pledge is good (21).

It is not in the ordinary course of an agricultural implement agent's business to trade off implements for horses; and a sale made by the agent of a machine which he had himself purchased from the manufacturer on a conditional sale contract, and on which he accepts a horse in part payment is not binding upon the owner of the machine unless he has authorized such a barter, or has ratified the same or taken the benefit of the consideration paid to the agent (22). Money or anything that bears a known value is a valuable consideration (23).

A purchaser of goods in consideration of the discharge of a pre-existing debt, is a purchaser for valuable consideration (24).

A landlord may be a purchaser in good faith from his tenant under a sale from the latter to him, by which he acquires the chattels either in satisfaction of or in part payment of his rent; or under a sale by the landlord's bailiff, acting under a warrant of distress for the rent, if the tenant consents to the landlord being a purchaser at such sale (25); but the distress must have been legally made, otherwise the sale might be treated as a conversion (26).

If a person purchases from the conditional vendee, knowing where and from whom the chattel was purchased by the latter, and that it had been obtained on credit, he is put upon enquiry to ascertain whether the

(21) *City Bank v. Barrow* 5 App. Cas. 678, per Blackburn J.; *Bush v. Fry* (1887) 15 Ont. R. 122.

(22) *Wesbrook v. Willoughby* (1895) 10 Man. R. 690.

(23) *Kevan v. Crawford* 6 Ch. D. 29.

(24) *Williams v. Leonard & Sons*, 26 Can. S.C.R. 406.

(25) *Farlinger v. McDonald* 45 U.C.R. 233.

(26) *Griffin v. McKenzie* 46 U.C.R. 93.

vendee had acquired the property in the chattel; and if he neglects to make enquiry he is not a 'bona fide purchaser without notice' (27).

A purchaser of a sewing machine from one whom he knows to be in possession thereof under a conditional sale has sufficient notice of the rights of original vendor to put him upon inquiry, although the one from whom he purchases tells him that she had complied with the terms of such conditional sale (28).

Creditors of the conditional vendee. In case of an agreement for the sale or transfer of merchandise of any kind under section 41 of the Ontario Bills of Sale Act to a trader or other person for the purpose of re-sale by him in the course of business, and under which such trader gets the possession but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership is void, and the sale or transfer deemed absolute, as against creditors as well as against mortgagees or purchasers from the trader, unless the agreement is in writing and is filed, as by that Act is required (29).

But creditors of the conditional vendee, in cases coming under the Conditional Sales Act of Ontario, can acquire no rights superior to that of the debtor (30).

And under the Conditional Sales Acts of New Brunswick, British Columbia and Prince Edward Island, creditors of the conditional vendee have no better claim against the chattels conditionally sold because of non-compliance therewith, the classes of

(27) *Sutherland v. Mannix* (1892) 8 Man. R. 541.

(28) *Singer Mfg. Co. v. Converse* (Colo.) 47 Pac. Rep. 264.

(29) R.S.O. 1897, c. 148, s. 41 (1).

(30) *Dominion Bank v. Davidson* 12 Ont. App. 92.

persons for whose benefit those statutes were passed being limited to subsequent purchasers or mortgagees without notice in good faith for valuable consideration (31).

E. purchased furniture in a dwelling house, and afterwards by memorandum in writing hired it to the seller. A creditor of the latter having seized it under execution, an interpleader issue was tried to determine the title, and it was held that E. was entitled to the goods; and that if the subsequent hiring had been a contract of sale and hire (which it was not), its non-registration would not make it void as against execution creditors, who are not protected by the Conditional Sales law of British Columbia (32).

In the North-West Territories, if the conditional sale be of goods of the value of \$15 or over, non-compliance with the Ordinance respecting hire-receipts and conditional sales (33) will prevent the seller or bailor from setting up his right of property or right of possession as against judgments, executions or attachments against the purchaser or bailee, unless the sale or bailment is in writing, signed by the bailee or his agent, and is registered in compliance with the Ordinance (34).

Under the Nova Scotia Bills of Sale Act of 1899, the contract of conditional sale must be filed pursuant thereto; otherwise the agreement that a lien for the price, or the property in the personal chattels, shall remain in the person letting to hire, the lessor or the bargainor until the payment in full of the hire, rental or price agreed upon, by future payments or otherwise,

(31) Stat. N.B. 1899, c. 12, s. 1; R.S.B.C. 1897, c. 169, s. 25; Stat. P.E.I. 1896, c. 6, s. 1.

(32) *Esnouf v. Gurney* 4 B.C.R. 144.

(33) Con. Ord. N.W.T. 1898, c. 44.

(34) Con. Ord. N.W.T. 1898, c. 44, s. 1.

will be null and void as against the creditors of the person hiring or of the lessee or bargainee, as well as against purchasers or mortgagees from him (35).

The expression "creditors" in the last-mentioned Act includes execution creditors, and sheriffs, constables and other persons levying or seizing under process of law personal chattels comprised in a bill of sale (36).

S. obtained a piano from M., under an agreement in writing that S. should pay rental therefor, for the period of thirty months, at the rate of \$10 per month, and that, on the completion of the payments agreed to be made, S. should be entitled to receive from M. "one piano, equal in value to the above-named piano, with a receipted bill of sale thereof." The piano was seized by the sheriff, under a writ of attachment against S., as an absent or absconding debtor, and M. claimed the right to resume possession of the piano, under provisions in the agreement enabling him to do so in such a case; it was held that, as there was nothing in the agreement entitling S., at the termination of the period of hiring, to the possession of the particular piano referred to in the agreement, M., being entitled to deliver, in place thereof, another piano of equal value, the contract was not one of conditional sale within the Nova Scotia Act (37), and that the owner of the piano was entitled to same as against creditors, although the contract had not been registered (38).

Non-compliance with the registration laws of a province cannot be taken advantage of by creditors of

(35) N.S. Laws 1899, c. 28, s. 8 (in force from date of proclamation).

(36) Sec. 2.

(37) R.S.N.S. 5th series, c. 92, s. 3.

(38) *Guest v. Diack* 29 N.S.R. 504, affirmed on appeal to Supreme Court of Canada, June 14th, 1898.

the conditional vendee if the conditional sale took place in another province, and the chattel was then in such other province.

M. purchased from plaintiffs, in Ontario, certain machinery for his factory in Nova Scotia under an agreement in writing signed in Nova Scotia, whereby M. agreed to pay for the machinery in certain instalments, and that until the whole amount of the purchase money was paid the title to the machinery should not pass from plaintiffs, and that it should not be removed from the premises without plaintiff's consent, and that in case of default plaintiffs should be at liberty to enter and take possession. The machinery was shipped to M. from Ontario, and the first cash payment was made as agreed, but, before any of the further payments had been made, M. made an assignment for the benefit of his creditors to defendant, under which the latter took possession of the machinery. Before the assignment was actually executed, the plaintiffs served M. with a demand of possession of the property under the terms of the agreement, and a similar demand was made upon the defendant assignee; it was held that the provisions of the Bills of Sale Act, R.S.N.S. 5th series, c. 92, were not applicable, the subject matter of the contract being property in Ontario when the contract was made, and the machinery having been brought into Nova Scotia subsequently (39).

It has been held that an authority given by the seller, in a conditional contract of sale, to the purchaser to sell the goods in the course of trade and appropriate the proceeds to his own use does not deprive the seller of the title to the goods remaining unsold against an assignee for creditors of the purchaser. (40).

(39) *McGregor v. Kerr* 29 N.S.R. 45.

(40) *Baker v. Tolles* (N.H.) 36 Atl Rep. 551.

Registration as notice. The fact of the existence of a registry law seems to require that any instrument affecting the title which is properly recorded should be held to be notice to everyone subsequently dealing with the title whether or not the record has been in fact examined (41).

In the United States the prevailing rule is that the presumption of knowledge is conclusive that a subsequent purchaser has full notice of any interest affected by the recorded instrument (42).

A purchaser before buying should clear up any doubts which apparently hang upon the title, by making due enquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man using ordinary caution, to make further enquiries, and he avoids the enquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained (43).

Whatever puts a party upon enquiry amounts in judgment of law to notice, provided the enquiry becomes a duty, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding (44).

The whole scheme of filing records of conditional sale contracts seems to imply that the purchaser of a chattel is put on enquiry as to whether a record or registration exists shewing that the chattel was obtained only upon a bailment, and that the title did not pass; and although registration is as regards title to land held not to be of itself notice unless the statute

(41) *Wade on Notice*, 2nd ed., sec. 97.

(42) *Cook v. Travis* 20 N.Y. 400; *Wood v. Chapin* 13 N.Y. 509; *Hunt v. Johnson* 19 N.Y. 279; *Wade on Notice*, s. 97.

(43) *Knapp v. Bailey* 79 Me. 195.

(44) 16 Am. & E. Encyc. 792.

so enacts (45), a person who does not choose to make any inquiry regarding documents required by law to be registered, may be treated as having had notice of a lien which was preserved by a vendor retaining possession of a registered document (46).

A purchaser who takes his purchase without investigation of title is affected with constructive notice of all that he would have discovered upon the usual investigation of title (47).

Apart from the registry laws, mere negligence to make enquiries where there is no knowledge or suspicion is not notice (48). The term "notice" in the corresponding section of the Imperial Factors' Act is said to mean "actual, though not formal, notice, that is to say either knowledge of the facts, or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge" (49).

From the time of the deposit of the instrument with the proper officer for record, it is to be regarded as constructive notice to all persons who subsequently deal with the title, notwithstanding any errors by the officer in recording the instrument, or even when he neglects to record it at all. The duty of the party bringing in the document to be filed or registered is fully accomplished when a perfect instrument is deposited in the hands of the proper officer, and he should not be held responsible for the officer's negligence in discharging a public duty (50). For a failure

(45) *Re Russell* (1871) 12 Eq. 78.

(46) *Kettlewell v. Watson* (1884) 26 Ch. D. 501, 508.

(47) *Gainsborough v. Watcombe* 54 L.J. Ch. 991; 53 Eng. L.T. 116.

(48) *Goodman v. Harvey* (1836) 4 A. & E. 870; *Bank of Bengal v. Fagan* (1849) 7 Moore P.C. 61.

(49) Chalmers (Judge) on Sale of Goods 3rd ed. 1896, p. 128; and see *Jones v. Gordon* (1877) 2 A. & C. Cas. 616.

(50) *Curtis v. Lyman* 24 Vt. 338.

to index the officer will be liable to the searcher of the records, who is thereby misled to his injury (51).

Estoppel.—If a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false; and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist (52). But the allowing of the conditional vendee to retain possession of the chattel after the time for payment in full had passed, and the returning to him of his promissory note on obtaining a new note from him in renewal, will not constitute an estoppel as regards the vendor's title reserved, if he has not wilfully endeavored to cause the third party who purchased from his vendee to believe that the price was paid (53).

If a man, either in express terms or by conduct, makes a representation to another, of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts (54).

And if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter intended to act upon it in a particular way, and he

(51) *Curtis v. Lyman* 24 Vt. 338; *Speer v. Evans* 47 Pa. St. 141.

(52) *Carr v. London & N.W. Ry.* L.R. 10 C.P. 307.

(53) *Mason v. Bickle* (1878) 2 Ont. App. 291, 298.

(54) *Carr v. London & N.W. Ry.* L.R. 10 C.P. 307.

with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented (55). But the practice of renewing notes is so common that the possession by the maker of a note given under a conditional sale agreement and endorsed by the payee does not demonstrate that it was retired by a cash payment, and the conditional vendor is not estopped as regards his title reserved, because of his endorsing such note and returning it to the vendee on obtaining another note in renewal, although the vendee used the same to induce a third party to believe him the owner and to purchase the chattle from him (56).

If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of things referred to did not exist (57).

Where safe-makers sold a safe to one H. on a written order which stipulated that he was to give his notes for the price, that his name was to be painted on the front of the safe, and that no title to the safe was to pass to H. until full payment of the price, and the name of the conditional purchaser was accordingly painted on the safe, it was held that the vendors were not by reason thereof estopped from proving and

(55) *Carr v. London & N.W. Ry.* L.R. 10 C.P. 307.

(56) *Mason v. Bickle* (1878) 2 Ont. App. 291.

(57) *Swan v. North British* 2 H. & C. 182; *Carr v. London & N.W. Ry.* L.R. 10 C.P. 307.

asserting their ownership as against a purchaser from their vendee (58).

The fact that the conditional vendor of a waggon knew at the time the bargain was made that the conditional purchaser proposed having the waggon re-painted, and that he took no steps to prevent his name and address, which had been painted on it in compliance with the Ontario Conditional Sales Act, from being obliterated by the re-painting, will not alone justify a finding of collusion so as to deprive the vendor of his lien or title as against a purchaser from the bailee (59).

Vendor registering a mechanic's lien.—The fact that the conditional vendor has registered a mechanic's lien against the realty in respect of an engine and boiler and machinery, the subject of the conditional sale, the articles having been affixed to the realty by the conditional vendee, will not constitute an estoppel against the vendors from suing in detinue for the article (60).

By filing the mechanic's lien the vendors do not elect to treat the fixtures as having become the property of the vendees or of the owners of the realty, and there will be no estoppel even if suit is brought to enforce the mechanic's lien if such suit be not prosecuted to judgment but dismissed by the plaintiffs themselves (61).

(58) *Walker v. Hyman* 1 Ont. App. 345.

(59) *Wettlaufer v. Scott* (1893) 20 Ont. App. 652.

(60) *Vulcan Iron Co. v. Rapid City Co.* (1894) 9 Man. R. 577

(61) *Vulcan Iron Co. v. Rapid City Co.* (1894) 9 Man. R. 577, 586; *Priestly v. Fernie* 3 H & C. 677; *Curtis v. Williamson*, L.R. 10 Q.B. 57.

Vendor's election making a conditional sale an absolute one.—In *McEntire v. Crossley* (62) the hire-purchase agreement provides as follows :—

"In case of failure in payment of any of the above mentioned sums, or in case the lessee, his executors, administrators or assigns, shall during the continuance of this agreement be adjudged bankrupt, or file a petition for liquidation, or make a composition with or any assignment for the benefit of his creditors, or suffer his effects to be taken in execution, or give a bill of sale, or on the breach of any of the covenants and conditions herein contained, the full balance of the said sum of ——— required for the purchase of the said engine shall, at the election of the owners and lessors, at once become payable to and be recoverable by them, who, however, instead of seeking to recover such balance may, if they think fit, seize and resume absolute possession of the said engine wherever the same may be, and for this purpose, if necessary, may break into the premises of the lessee where the said engine may from time to time be, or be reasonably thought to be, and sell the same in such way as they may think fit, and the several sums which shall have been paid by the lessee shall be forfeited to the owners and lessors, and out of the purchase money to arise from any sale of the said ——— engine the owners and lessors may reimburse themselves, and pay all the costs and expenses incurred in such seizure and sale, or in connection therewith, and after retaining the difference between the instalments so actually paid by the lessee under the provisions aforesaid, and the said sum of ———, pay the surplus (if any) unto the lessee, his executors, administrators or assigns, or to whom he or they shall direct.

"Provided always, and it is hereby agreed and declared that in case the owners and lessors shall see fit to resume the possession of the said ——— engine under this agreement without proceeding to a sale, then the loss occasioned them by reason of the non-performance of the provisions of this agreement on the part of the lessee shall be borne by the lessee, and in case of bankruptcy the owners and lessors shall be entitled to prove against his estate for the same as and for liquidated damages."

It was there held by the House of Lords that if the vendors elected, as they were entitled to do under the contract, to sue for the remainder of the instalments, treating them all as at once payable, their election would be to have the purchase then completed and they could not sue for the purchase money, and insist that the property in the goods, the price of which

they were suing for, had not passed (63). And if the vendor recover judgment for the price of the chattel by virtue of an acceleration clause or otherwise, and although the action is upon an acceptance given in pursuance of the contract of conditional sale for the price agreed upon, and not in terms for the price of goods sold and delivered, it is held in New Brunswick that the vendors thereby elect to treat as absolute a sale which had been conditional only, and the bringing of the action was an admission by them that the property had passed, as that was the only position consistent with a claim for the price upon which a judgment had been obtained (64).

Fixtures to realty.—Except where otherwise provided by statute, the affixing of the chattel conditionally sold to the freehold of another, if not done by the conditional vendor, will not operate to deprive the owner of the chattel of his right to remove it, if it can be removed without serious damage to the realty (65).

Mw... If a hot-air furnace be placed in a house and affixed to the realty by a person ~~owing~~ both the furnace and the realty, and who does so in pursuance of an agreement for a loan on the realty, he cannot legally remove the furnace from the premises during the currency of the mortgage given for the loan; and if it be removed no title to it will pass even to an innocent purchaser, and the mortgagee will be entitled to an order for its replacement (66).

Where a boiler and pipes were purchased under a conditional sale ~~contraet~~, under which the vendors

(63) *McEntire v. Crossley* (1895) A.C. 457, 464.

(64) *Purtle v. Heney* (1996) 33 N.B.R. 607 (Sup. Ct. N.B.).

(65) *Vulcan Iron Works Co. v. Rapid City Co.* (1894) 9 Man R 577; *Polson v. Degeer* 12 Ont. R. 275.

(66) *American Investment Co. v. Sexton* 26 Ont. R. 77.

affixed the same to realty occupied by the purchaser, it was held that the vendors had a right as against the land mortgagee to remove the boiler, etc., under their contract, while the purchaser remained in possession of the land as mortgagor (67).

An authority from the mortgagee to the mortgagor to agree to the removal is in such case implied; but if the lands be transferred to a purchaser without notice of the right of the conditional vendor to remove the fixture, the lands will pass free from the claim to detach the fixture (68).

It is not a necessary inference from the simple fact of annexation, where the chattel is severable without material injury to itself or to the freehold, that the chattel becomes the property of the freeholder; but it is always open to inquiry under what circumstances it was annexed, and whether an agreement did not exist under which the owner would be at liberty to take it away again (69). If, however, there is such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil, then it became freehold, e.g., piles driven into the bed of a river (70).

An engine affixed by means of screws and bolts to a concrete bed in freehold land for the purpose of driving a saw mill on the land, will, in the absence of special circumstances, cease to be a chattel, and become part of the freehold. A. let the engine to B. on a hiring agreement of an ordinary nature, and it was necessarily fixed to the freehold in the way above indicated. B. then mortgaged his freehold to C., who had no notice of the hiring agreement, and became a mortgagee in

(67) *Gough v. Wood* (1894) 1 Q.B. 713.

(68) *Hobson v. Gorringe* (1897) 1 Ch. 182.

(69) *Hall Co. v. Hazlitt* (1885) 11 Ont. App. 749.

(70) *Lancaster v. Eve* 5 C.B.N.S. 717.

possession. B. having failed to pay the instalments under the hiring agreement, A. claimed the engine back, but the mortgagee contended that it had passed to him under the conveyance of the freehold. It was held that the mortgagee's contention was the correct one, and that A. had lost his engine. The following remarks of Lord Justice Smith, who delivered the judgment of the Court, are instructive—"That a person can agree to affix a chattel to the soil of another so that it becomes part of the other's freehold, upon the terms that the one shall be at liberty, in certain events, to retake possession, we do not doubt; but how a *de facto* fixture becomes not a fixture, or is not a fixture as regards a purchaser of land for value and without notice, by reason of some bargain between the affixers, we do not understand, nor has any authority to support this contention been adduced" (71).

The test as to the removal under a conditional sale contract of chattels affixed to the freehold of the vendee's landlord is:—Could the conditional vendees, had they affixed them to *their own* property have successfully resisted a claim by their vendor, on the ground that they had converted them into freehold, although the vendor must be held to have known that it was intended so to use the chattel that it would be annexed to the freehold? (72).

M. ordered from the W. Co. certain planing mill machinery at an agreed price, part of which was paid down, and notes were given for the balance, but the agreement provided that notwithstanding the payment, and the giving of the notes, the property in the machinery should not pass to M. but should remain in the W. Co. until payment in full. The machinery was placed in a building which was thereafter used as

(71) *Hobson v. Gorringe* (1897) 1 Ch. 182; 66 L. J. Ch. 114.

(72) *Hall Co. v. Hazlitt* (1885) 11 Ont. App. 749.

a planing mill, and M. then mortgaged the lands to H. without mention of the machinery. Afterwards upon M.'s representation that there were no encumbrances upon the land, the W. Co. took from him a mortgage of the land, including the machinery described in detail and which were thereby declared "to be considered as fixtures and not as chattels." It was held that as between the W. Co. and M. the machinery remained chattels, such being the intention expressed in the agreement between them, and that the declaration to the contrary contained in the mortgage was not binding because of the misrepresentation, and that the mortgage to H. was, notwithstanding, subject to the title reserved by the contract of conditional sale (73).

The proper form of judgment for the recovery of chattels affixed to the freehold is to declare that they are the property of the plaintiffs, that the defendants detained the same and that the defendants do permit the plaintiffs by themselves, their servants or agents to remove the same on demand, and failing such permission that the plaintiffs may, as an alternative relief, recover for the wrongful detention the amount assessed or to be assessed as the damages (74).

In the Province of Quebec it is held that to immobilize movables by destination they must be affixed to the realty by their owner and not by another person (75).

Fixtures in Ontario.—By an Ontario statute (76) passed in 1897, if a chattel conditionally sold is affixed to realty without the consent *in writing* of the vendor,

(73) *Waterous Co. v. Henry* (1884) 2 Man. R. 169.

(74) *Polson v. Degeer* 12 Ont. R. 275; *Vulcan Iron Works Co. v. Rapid City Co.* (1884) 9 Man. R. 577, 587.

(75) *Waterous Co. v. Hochelaga Bank* 5 Que. Q.B. 125; affirmed 27 Can. S.C.R. 406.

(76) 60 Vict. (Ont.) c. 3, s. 3; c. 14, s. 80; now R.S.O. 1897, c. 149, s. 10.

it will continue to be subject to the provisions of the Conditional Sales Act, and the vendor will retain his claim thereon if he has complied with its provisions; but the person holding title to the realty is given the statutory right to retain the chattel upon payment of the amount due and owing thereon (77). This enactment is declared to be retroactive and to apply to past as well as to future transactions (78).

Fixtures in New Brunswick. By a recent statute of the New Brunswick Legislature it is enacted that where any goods or chattels have been sold or bailed under any receipt note, hire receipt, or other instrument by which it is agreed that no ownership therein shall be acquired by the purchaser or bailee until the payment of the purchase or consideration money, or some stipulated part thereof, and such goods or chattels are affixed to any realty without the consent in writing of the owner of the goods or chattels, such goods and chattels shall not be or become part of the realty, but shall continue to be and remain personal property; and the rights of the owner or owners thereof shall not be in any way altered or affected by such goods or chattels being so affixed to the realty, but the owner of such realty or other purchaser or any mortgagee or other incumbrancer on such realty shall have the right as against the manufacturer, bailor or vendor of such goods or chattels, or any person claiming through or under them, to retain the said goods and chattels upon payment of the amount due and owing thereon (79).

The provisions of this section are declared to be retroactive, and apply to past as well as to future transactions, but not to any suit either at law or in

(77) R.S.O. 1897, c. 149, s. 10.

(78) R.S.O. 1897, c. 149, s. 10 (2).

(79) Stat. N.B. 1899, c. 12, s. 8.

equity pending at the date on which it was passed, i.e., 28 April, 1899 (80).

Purchase from conditional vendee British Columbia.—The British Columbia "Sale of Goods Act" (81) enacts that, subject to its provisions, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell; but this is expressly made subject to the provisions of the Factors' Act, and any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof (82).

Nor is the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction to be affected by the Sale of Goods Act (83).

On sales of goods in market overt according to the usage of the market, the buyer acquires, under the British Columbia Act, a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller (84); but the law relating to the sale of horses is not to be affected by that statute (85).

The market-place or spot of ground set apart by custom for the sale of particular goods is the only market overt (except in the City of London), and the

(80) Sec. 8 (2).

(81) R.S.B.C. 1897, c. 169, s. 33.

(82) Sec. 33.

(83) Sec. 33.

(84) R.S.B.C. 1897, c. 169, s. 34.

(85) Sec. 34 (2).

market overt is held only on special days provided for by charter or prescription (86).

The privileges of the market overt do not embrace sales made in a covert place within its limits, as in a back room or warehouse, or in a shop the windows of which are closed up (87), nor sales of goods not usually sold in that particular market (88), nor sales between sunset and sunrise, nor where the negotiations for the sale were begun out of market overt (89).

If, however, the goods have been stolen, and the offender is prosecuted to conviction, even a sale in market overt will not give a good title (90).

Special provisions regarding sales of *horses* in market overt were exacted in England by Statute 2 & 3 Ph. & M., c. 7, and Statute 31 Eliz., c. 12. These require that the sellers of horses at fairs, etc., shall be known to the toll-keeper or some other credible person there, and that a note of the sales and of the prices should be entered in the toll-keeper's book, and a memorandum thereof given to the buyer (91).

A question of considerable importance arises with respect to sub-section 2 of sec. 37 of the British Columbia Sale of Goods Act (92). By it, the person who has *agreed to buy* goods, and who has obtained with the consent of the seller, the possession of same, is enabled to transfer a good title to them in like manner as a mercantile agent may do. The section mentioned enacts that :—

(86) Smith's Merc. Law, 10th ed. 596; Tudor's Merc. Cases, 3rd ed. 277.

(87) Smith's Merc. Law 598.

(88) *Marner v. Banks* 17 L.T.N.S. 147.

(89) Smith's Merc. Law 599.

(90) Sec. 36.

(91) Tudor's Merc. Law, 3rd ed. 284.

(92) R.S.B.C. 1897, c. 169.

"Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

This sub-section of the British Columbia Sale of Goods Act is identical with a provision contained in the English Sale of Goods Act of 1893 (93). A conditional vendee is, without doubt, a person who has agreed to buy goods, and, from the nature of the transaction, he also obtains possession of the goods with the consent of the seller.

The term "mercantile agent" is declared by sub-section 3 to have the same meaning in the section quoted as it has in the Factors' Act (B.C.) (94), namely, a "mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." Whether or not a person acting for the conditional vendee in effecting a sale is a "mercantile agent acting for him" within the meaning of the statute is a question of fact (95); but a sheriff selling the chattel under an execution against the conditional vendee could hardly be considered as coming within the definition of a mercantile agent or as *acting for* the person against whom the execution had issued.

The British Columbia Factors' Act also contains a

(93) 56 and 57 Vict. (Imp.) c. 71, s. 25.

(94) R.S.B.C. 1897, c. 4.

(95) *Strohmenger v. Attenborough* 11 Times L.R. 7.

provision (section 9) taken from an earlier Imperial Act (96) as follows:—

Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, *or under any agreement for sale, pledge or other disposition thereof*, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

It will be observed that the section in the British Columbia Factors' Act is more extensive than that in the Sale of Goods Act (B.C.), in that the former includes not only sales, pledges, etc., but *agreements for sales, pledges, etc.*, and that the clauses are alike, except as to the italicized words. Neither enactment repeals the other, and the result is that both are in force. The sections of the Imperial Acts, from which these provisions were taken, are also both in force in England.

The authority of a 'mercantile agent' to pass the title to goods is declared in section 3 of the Factors' Act (B.C.), as follows:—

Where a mercantile agent is, with the consent of the owner, in possession of goods, or of documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall (subject to the provisions of that Act) be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the

(96) The Factors' Act 1889, 52 & 53 Vict. (Imp.), c. 45, s. 9.

time of the disposition notice that the person making the disposition has not authority to make the same (97).

It is also enacted that for the purposes of the Factors' Act (B.C.) the consent of the owner shall be presumed in the absence of evidence to the contrary (98).

A factor is not by his employment authorized to pawn or pledge goods entrusted to him, and apart from certain statutory provisions, such as the one just mentioned, which validate transfers of that nature made by him, such a disposition is not binding upon his principal (99).

A conditional vendee is, therefore, by virtue of these clauses in the Sale of Goods Act and in the Factors' Act, enabled to make as valid a sale or pledge of the chattel which he has purchased as if he were in possession thereof with the consent of the owner, with authority either to sell the goods or to raise money on them, (100) as a factor or mercantile agent may do.

Under the Imperial Factors' Act of 1889 (101) it has been decided by the House of Lords in *Helby v. Matthews* that the expression "having agreed to buy goods," which is used in that Act, and likewise in the British Columbia Acts before mentioned, applies to a person who has bound himself by agreement to buy, and does not include a person who has merely an *option to buy* (102).

In that case the owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments, on the terms that the hirer might terminate the hiring

(97) R.S.B.C. 1897, c. 4, s. 3 (1).

(98) R.S.B.C. 1897, c. 4, s. 3 (4).

(99) *Cole v. North Western Bank* (1875) L.R. 10 C.P. 354, 363.

(100) R.S.B.C. 1897, c. 4.

(101) 52 and 53 Vict., c. 45, s. 9.

(102) *Helby v. Matthews* (1895) A.C. 471 (H.L.), reversing S.C. (1894) 2 Q.B. 262.

by delivering up the piano to the owner, he remaining liable for all arrears of hire; also that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment the piano should continue the sole property of the owner. The hirer received the piano, paid a few of the instalments and pledged it with a pawnbroker as security for an advance. It was held that under the agreement the hirer was under no legal *obligation* to buy, but had an option either to return the piano, or to become its owner by payment in full; by putting it out of his power to return the piano he had not become bound to buy; that he had, therefore, not "agreed to buy goods" within the meaning of the Factors' Act, and that the owner was entitled to recover the piano from the pawnbroker. The question is not whether the owner has agreed to *sell* but whether the hirer has agreed to *buy*. It is not the owner's acts which are dealt with, but the acts of the hirer, and therefore even if the owner irrevocably binds himself to sell, but the hirer does not bind himself to purchase, even though he has an option, the hirer cannot possibly be "a person having bought or agreed to buy" (103).

If, however, there is an absolute obligation to acquire the property in the chattel and to pay all the instalments, whether described as for rent or hire, then the case is within the Acts and the title will pass on a sale by the conditional vendee, notwithstanding his own want of title, if the sale pledge or other disposition thereof be to any person receiving the same *in good faith* and *without notice* of any lien or other right of the original seller in respect of the goods (104).

(103) *Helby v. Matthews* (1894) 2 Q.B. 262; (1895) A.C. 471.

(104) R.S.B.C. 1897, c. 4, s. 10; R.S.B.C. 1897, c. 169, s. 37 (2); *Lee v. Butler* (1893) 2 Q.B. 318; *Thompson v. Veale*, 74 Eng. L.T. 130.

It is therefore necessary, if it is desired to avoid the far-reaching effects of section 10 of the Factors' Act and of section 37 of the Sale of Goods Act, that the contract should be one of hiring with an option of purchase, as was the case in *Helby v. Matthews*, rather than a contract of hiring with an obligation to purchase. The following was the form of agreement under consideration in that case (105).

"This Agreement, made the 23rd day of December, 1892, between Charles Helby, of 22 Baker Street (hereinafter called the 'owner'), of the one part, and Charles Brewster, of 24 Chester Street, Kennington Road, S.E. (hereinafter called the 'hirer'), of the other part, Witnesseth that the owner agrees, at the request of the hirer, to let on hire to the hirer a pianoforte, No. 896, maker, Rass, and in consideration thereof the hirer agrees as follows:

"1. To pay the owner, on the 23rd day of December, 1892, a rent or hire instalment of 10s. 6d., and 10s. 6d. on the 23rd of each succeeding month.

"2. To keep and preserve the said instrument from injury (damage by fire included).

"3. To keep the said instrument in the hirer's own custody at the above named address, and not to remove the same (or permit or suffer the same to be removed) without the owner's previous consent in writing.

"4. That if the hirer do not duly perform this agreement, the owner may (without prejudice to his rights under this agreement) terminate the hiring and retake possession of the said instrument; and for that purpose leave and license is hereby given to the owner (or agent and servant, or any other person employed by the owner) to enter any premises occupied by the hirer, or of which the hirer is tenant, to retake possession of the said instrument, without being liable to any suit, action, indictment or other proceeding by the hirer, or anyone claiming under the said hirer.

"5. That if the hiring be terminated (under clause A below) and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire up to the date of such return, and shall not on any ground whatever be entitled to any allowance, credit, return or set off for payments previously made.

"The owner agrees:

"A. That the hirer may terminate the hiring by delivering up to the owner the said instrument.

"B. If the hirer shall punctually pay the full sum of £18 18s., by 10s. 6d. at date of signing, and thirty-six monthly instalments of

108. 6d. in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.

"C. Unless and until the full sum of £18 18s. be paid, the said instrument shall be and continue to be the sole property of the owner."

A hiring contract would appear to be subject to the requirements of section 25 of the Sale of Goods Act as to being evidenced in writing, and being filed as a conditional sale agreement, although it provides for a mere option of purchase.

Where the hire-purchase contract is one by which the conditional vendee 'agrees to buy' as distinguished from his having a mere option to buy, it is necessary to consider whether the third party claiming title through the conditional vendee adversely to the conditional vendor, is a person receiving the chattel 'in good faith without notice of any lien or other right of the original seller.' The question of notice from the mere fact of registration has been discussed under that heading (106).

Whether or not the reserved title and claim of the conditional vendor be in strictness a 'lien', there seems to be no question that it comes within the phrase 'other right of the original seller' (107).

Purchase from conditional vendee—North-West Territories.—Section 10 of the Factors' Ordinance of the North-West Territories (108) is identical with section 9 of the Imperial Factors' Act of 1889 to which reference has been made *ante* p. 124, with a similar statutory definition as to the meaning of the term "mercantile

(106) *Ante* p. 110.

(107) *Lee v. Butler* (1893) 2 Q.B. 318; *Helby v. Matthews* (1895) A.C. 471.

(108) Con. Ord. N.W.T. 1898, c. 40, re-enacting Ordinance No. 9 of 1896.

agent" (109) as is contained in the British Columbia Factors' Act.

Sub-sec. 2 of sec. 25 of the Sale of Goods Act, N.W.T. (110), is similar to the clause in the Factors' Act, N.W.T., with the exception that the words "or under any agreement for sale, pledge, or other disposition thereof," which appear in the latter Act, are omitted in the Sale of Goods Act, thus following the course of legislation in England with regard to the similar enactments in the Factors' Act of 1889 and the Sale of Goods Act of 1893.

As to notice by registration see *ante* p. 110.

Purchase from conditional vendee—Manitoba.—

The Sale of Goods Act of Manitoba (111) enacts that, subject to its provisions, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell; but this is not to affect (a) the provisions of any enactments enabling the apparent owner of goods to dispose of them as if he were the true owner thereof, or (b) the validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction (112).

By the same Act (113) it is also enacted that—

Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or

(109) Con. Ord. N.W.T. 1898, c. 40, s. 2 (1); c. 39, s. 25 (3).

(110) Con. Ord. N.W.T. 1898, c. 39, re-enacting Ord. No. 10, 1896.

(111) Stat. Man. 1896, c. 25, s. 21.

(112) Sec. 21 (2).

(113) Stat. Man. 1896, c. 25, s. 24 (2).

by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

This is identical with sub-section 2 of section 25 of the Imperial Sale of Goods Act, 1893, and with sub-section 2 of section 37 of the British Columbia Sale of Goods Act already referred to (114).

The term "mercantile agent" is by the same Act declared to mean a mercantile agent having in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (115).

As there is no provision for registration of hire-receipts, receipt-notes, or orders for chattels sold by way of conditional sale in Manitoba, the question arises whether the fact that the manufacturer's name and address is affixed to the chattel pursuant to the Lien Notes Act (116) is a sufficient notice to a purchaser or pledgee of same to put the latter on enquiry as to the manufacturer's claim of title. There appears to have been no decision on the point, but it would probably be held that it is either notice in itself, or is such a circumstance as compels the purchaser or pledgee to make enquiries from the manufacturer whose name so appears on the chattel, and places him under a like liability, should he neglect such an ordinary precaution, as if he had enquired and had received notice of the manufacturer's claim, if any. The manufacturer is by the Lien Notes Act compelled to furnish

(114) Ante p. 122 and 123.

(115) Sec. 24 (3).

(116) R.S.M. 1891, c. 87.

the requisite information to any applicant forthwith on application (117). If, however, there is no such name and address on the chattel at the time of the negotiation with the third party, he may, by virtue of sec. 24 (2) of the Sale of Goods Act, acquire a good title notwithstanding the lien reserved by the vendor, provided he receives the goods in good faith and without notice of the real owner's right or title (118). *But see amending Act. 8 of 1891, c. 18, s. 1.*

Creditors and subsequent purchasers Nova Scotia.

Until the proclamation of the new Bills of Sale Act of 1899 in this province, the rights of creditors, and of subsequent purchasers and mortgagees, of the conditional vendee as regards non-compliance by the conditional vendor with statutory provisions, are governed by section 3 of the Secret Bills of Sale Act R.S.N.S. 5th series (1884) chapter 92, as amended by the Nova Scotia statutes of 1886 (119) and 1893 (120). That section, as amended, reads as follows:—Every hiring, lease or agreement for the sale of goods and chattels accompanied by an immediate delivery, and followed by an actual and continued change of possession, whereby it is agreed that the property in the goods and chattels, or in case of an agreement for sale, a lien thereon for the price or value thereof, or any portion thereof, shall remain in the hirer, lessor, or bargainor, until the payment in full of such price or value by future payments or otherwise, shall be in writing signed by the parties thereto, or their duly authorized agents in writing, a copy of which authority shall be attached to such

(117) R.S.M. 1891, c. 87, s. 3.

(118) Stat. Man. 1896, c. 25, s. 24 (2). *see N.S. 1899, c. 36*

(119) N.S. Laws 1886, c. 32, s. 1.

(120) N.S. Laws 1893, c. 40, s. 1.

agreement, and shall set forth fully, by recital or otherwise, the terms, nature and effect of such hiring, lease or bargain for sale, and the amount to be paid thereunder, whether expressed as rent, payment, or otherwise; and shall be accompanied by the affidavit of either of the parties; or in case such agreement has been signed by an agent or agents of the parties, duly authorized as aforesaid, then by the affidavit of the agent of either of the parties thereto, stating that the writing truly sets forth the agreement between the parties thereto, and truly sets forth the claims, lien or balance due to the hirer, lessor, or bargainor therein, and that such writing is executed in good faith, and for the express purpose of securing to the hirer, lessor, or bargainor, the payment of the claim, lien, or charge thereon, at the times and under the terms set out in the writing, and for no other purpose; and such agreement and affidavit shall be registered at the time and place, and in every respect according to the provisions of this chapter; otherwise the claim, lien, charge, or property intengled to be secured to the hirer, lessor, or bargainor, shall be null, void, and of no effect as against the creditors and subsequent purchasers and mortgagees of the person to whom such goods and chattels are hired, leased, or agreed to be sold.

The chapter referred to, number 92 R.S.N.S. (5th series) 1884, provides for registration of bills of sale, etc., with the registrar of deeds of the county or district where the maker resides.

As soon as the 1899 Act is proclaimed (121) the above section will be superseded by it, and the former Acts above referred to will be repealed by virtue thereof (122).

(121) N.S. Laws, 1899, c. 28, s. 13 (1).

(122) N.S. Laws 1899, c. 28, s. 13 (2).

In this province also there is in force a statutory provision, contained in the Nova Scotia Factors' Act of 1895, identical with section 9 of the British Columbia Factors' Act, *ante* pp. 124 et seq., by which a person who has *agreed to buy* goods, and who has obtained possession of same with the seller's consent, may in certain cases confer a valid title (123). As to that subject see *ante* pages 123 to 128 inclusive, and as to notice by registration see *ante* page 110.

(123) N.S. Laws 1895, c. 11, s. 9.

CHAPTER VI.

CHATTEL LIENS GENERALLY.

Lien, general or specific—A lien (answering to the *tacita hypotheca* of the civil law) is a right in one man to retain that which is in his possession belonging to another, until certain demands of the person in possession are satisfied. It is neither a *jus in re* nor a *jus ad rem*; it is not a right of property in the thing itself, nor a right of action for the thing itself (1).

Liens are either specific or general. A specific lien is a right to retain a thing for some charge or claim growing out of, or connected with, the identical thing; a general lien is a right to retain a thing, not only for charges and claims specifically connected with the identical thing, but also for a general balance of account between the parties in respect of other dealings. Specific or particular liens may arise in various ways—by express contract, by implied contract resulting from the usage of trade or the manner of dealing between the parties, by mere operation of law from the relation and acts of the parties independently of any contract.

The term lien is applied in various modes, but in all cases it signifies an obligation, tie or claim annexed to or attaching upon property, without satisfying which such property cannot be demanded by its owner. Lien in its proper sense is a right which the law gives; but it is also usual to speak of lien by contract, although that is more in the nature of an agreement for a pledge (2).

(1) *Trottier v. Red River Transportation Co.* (1879) Man. Rep. 100p. Wood 255.

(2) *Ridgely v. Inglehart* 3 Bland Ch. (Md.) 540.

A lien, at law, is an implied obligation whereby property is bound for the discharge of some debt or engagement; it is not the result of an express contract, but is given by implication of law (3).

Vendors of property, and persons who have expended work and labour on goods, are said to have a 'lien' on the property so long as they are still in possession of it; that is to say, they have a right to retain it in their possession till their claims in respect of it have been satisfied (4).

The holder of goods who claims a lien upon them for charges in respect of the goods themselves may interplead where the right to them is disputed (5); but not if his claim is only in respect of a debt due from one of the contending parties (6).

Equitable Liens.—An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity out of general considerations of right and justice as applied to the relations of the parties and the circumstances of their dealings; and does not depend upon the possession as do liens at law (7).

An equitable lien may be contracted for in respect of future property, and will attach as an equitable charge upon the particular property as soon as the person contracting the charge acquires title and possession of the same (8).

(3) *Re Leith's Estate* L.R. 1 P.C. 296.

(4) *Holland's Jurisprudence*, 2nd ed., 172.

(5) *Cotter v. Bank of England* 3 Mo. & Sc. 185.

(6) *Braddick v. Smith* 2 Mo. & Sc. 131.

(7) *Jones on Liens* 27.

(8) *Wisner v. Ocumpaugh* 71 N.Y. 113.

An appropriation of goods susceptible of delivery, for the purpose of creating a lien thereon in favor of another, must in order to be valid constitute a delivery good at common law (9).

The Statute of Frauds does not in any of its provisions apply to agreements for liens (10).

Statutory Liens.—Under various statutes in the different provinces of Canada the right of lien has been extended to various classes of persons, such as woodmen, livery stable keepers, boarding house keepers, and others, who had no lien at common law. These, and the common law liens of most frequent occurrence, as well as the right of stoppage in transitu and certain other privileges in the nature of liens, are made the subjects of the succeeding chapters.

Provision has also been made by statute in most of the Provinces, whereby lien holders, whether entitled at common law or by statute, are given a power of sale for the realization of their claims, there being no such privilege attached to liens under the common law.

Evidence of general lien.—A general lien may be proved, either by evidence of an express agreement, of the mode of dealing between the parties, or of the general usage of other persons engaged in the same employment, of such notoriety that it may fairly be presumed to be known to the owner of the goods (11).

But to establish a general lien by evidence of the general usage the instances ought to be 'ancient,

(9) *Malcolm v. Harnish* (1894) 27 N.S.R. 262.

(10) Per Strong, C.J., in *Byers v. McMillan* (1887) 15 Can. S.C.R. at p. 201.

(11) *Rushforth v. Hadfield* 7 East 228; *Plaice v. Allcock* 4 F. & F. 1074.

numerous and important' (12). If a general usage be shown that a lien for a general balance shall be enjoyed by a particular trade, all who deal with persons following that trade are supposed to contract on the footing of the general practice, and to adopt the general lien into the particular contract (13).

A general lien will cover a debt on which the right of action is barred by the Statute of Limitations (14).

A wharfinger is entitled to a lien for the general balance due him (15); and so is a calico printer (16), or a dyer (17). Factors or commission agents entrusted with goods for sale on account of their principal have a general lien (18); and so have packers, whose business is similar to that of factors (19). An innkeeper has a general lien on the goods of his guests, and his lien extends even to goods fraudulently obtained from a third party by the guest (20).

A *general* lien, however, will be limited to the amount chargeable against the goods prior to notice that the owner has sold them (21).

Evidence of specific lien. Where a person bestows his labour on a particular chattel delivered to him in

(12) *Rushforth v. Hadfield* 6 East 526.

(13) *Rushforth v. Hadfield* 6 East 519.

(14) *Morse v. Williams* 3 Esp. 418.

(15) *Naylor v. Mungles*, 1 Esp. 110; *Spears v. Hartley*, 3 Esp. 81.

(16) *Welden v. Gould*, 3 Esp. 268.

(17) *Savill v. Barchard* 4 Esp. 53; *Montague on Liens* 30 n.

(18) *Kruger v. Wilcox* Amb. Rep. 252; *Stevens v. Biller* 25 Ch. D. 31.

(19) *Green v. Farmer* 4 Burr. 2222; *Savill v. Barchard* 4 Esp. 55; *Ex p. Sherbrooke* 2 Ch. D. 489.

(20) *Mullins v. Florence* 3 Q. B. D. 484.

(21) *Barry v. Longmore* 12 Ad. & E. 639.

the course of his business, he has a lien upon such chattel for the amount of his charge (22). The lien only arises as against the person who authorized the work to be done (23).

A tailor has a lien on the cloth delivered to and made up by him (24); a miller on the flour ground from the grain delivered to him for that purpose (25); and a shipwright on a ship delivered to him for repairs (26).

The seller of goods not sold on credit has a lien for the price so long as he keeps possession of the same (27), and any unpaid seller has a right in the nature of an equitable lien to stop the goods *in transitu* upon the purchaser becoming insolvent (28).

A person by whom a chattel has been improved has a possessory lien thereon for the price of his labour, or of his skill though it be exercised without actual labour, and for the expenses incurred in the improvement of the chattel (29).

Partners in trade may have a lien for labour, although one of them is a part owner of the chattel upon which the work was done (30).

(22) *Steadman v. Hockley* 15 M. & W. 553.

(23) *Hollis v. Claridge* 4 Taunt. 807; *Castellain v. Thompson* 13 C.B.N.S. 105.

(24) *Hussey v. Christie* 9 East, 433; *Blake v. Nicholson* 3 M. & S. 160.

(25) *Ex p. Ockenden* 1 Atk. 235.

(26) *Ex p. Willoughby* 16 Ch. D. 604.

(27) *Imperial Bank v. London & St. Katherine's Docks* 5 Ch. D. 195.

(28) *Phelps v. Comber* 29 Ch. D. 821.

(29) *Bryan v. Waters* 3 C. & P. 520; *Judson v. Etheridge* 1 Crompt. & M. 743.

(30) *Franklin v. Hosier* 4 B. & Al. 341.

Care of chattel under lien. A person holding a chattel by virtue of a lien is under an obligation similar to that of a pawnee as regards its custody; he must use ordinary diligence (31); but he cannot require payment for the use of the place in which the chattel is detained, or otherwise for keeping it, even although he has given notice that such a payment will be demanded (32). The lien holder may without forfeiting his lien deliver the goods to his creditor to hold as security to the extent of the lien, and may appoint him to keep possession as the servant of the bailee (33), or may in equity assign the benefit of the lien, together with the debt in respect of which it is claimed (34); but if he tortiously transfer the goods as his own the owner may maintain trover for them (35).

Lien allowed.—A cellarer has a lien for his charges or rental upon the goods deposited with him (36); an accountant has a lien upon the books of account for work done thereon, if he holds possession of the books (37); and an arbitrator has a specific lien upon the award for his fees (38). And, generally, every bailee for hire who has, by his labour and skill, or by the use of any instrument over which he has control, imparted additional value to the chattel is entitled to a lien (39).

(31) *Angus v. McLachlan* 23 Ch. D. 330.

(32) *Somes v. British Co.* 8 H.L.C. 338.

(33) *McCombie v. Davies* 7-Fast 5.

(34) *Bull v. Faulkner* 2 DeG. & S. 772.

(35) *Scott v. Newington* 1 Moo. & R. 252.

(36) *Gray v. Chamberlain* 4 Car. & P. 260.

(37) *Ex p. Southall* 12 Jur. 576.

(38) *R. v. South Devon Ry.* 15 Q.B. 1043; *Re Coombs* 4 Ex. 889.

(39) *Jackson v. Cummins* 5 M. & W. 342.

The salvor of property endangered by perils of the sea has a lien on it for the amount of a fair remuneration (40).

A solicitor has a lien upon a document placed in his hands by a person entitled to dispose of it, for the price of work done thereon (41); and also a general lien in respect of professional charges, upon all documents or other property of the client which come to his hands in the character of solicitor while conducting the business or for the purposes of the client (42). The lien exists only in respect of property received in his capacity of solicitor and in the performance of his professional duty to the client (43); and does not extend to documents received by the solicitor as a land agent (44), or merely to keep for safe custody (45).

At common law a person finding upon his land animals belonging to another, doing injury by treading down his growing crops or the like, is entitled to distrain them until satisfaction is made to him for his loss (46); a landlord also has a right to distrain upon his tenant's goods for rent in arrear. The exercise of the right of distress places the chattels distrained on in the custody of the distrainor, or of his bailiff, and the distrainor becomes a lien holder in respect of the goods seized.

A trustee has a lien on the property in his hands subject to the trust for money properly expended

(40) *Hingston v. Wendt* 1 Q.B.D. 367.

(41) *Hollis v. Claridge* 4 Taunt. 807.

(42) *Ex p. Sterling* 16 Ves. 258; *Ex p. Nesbitt* 2 Sch. & Lef. 279; *Friswell v. King* 15 Sim. 191.

(43) *Stevenson v. Blakelock* 1 M. & S. 535.

(44) *Re Walker* 68 Eng. L.T. 517.

(45) *Ex p. Fuller* 16 Ch. D. 617.

(46) 3 Black. Com. 7.

thereon (47); but this is an equitable lien and is dependent upon a contract, express or implied, for the reimbursement of a trustee before calling upon him to deliver up the property.

Lien denied.—There is no lien in favor of the person who has obtained possession of chattels by fraud, misrepresentation or other wrongful act (48); nor where, by the nature of the contract between the owner of the chattel and the person claiming the lien, the chattel is received upon the terms that the owner is to have the control and right of possession, and use of the chattel at his pleasure, for such is inconsistent with the nature of a lien (49).

A mere statement communicated to the consignees of goods that a bill of ~~lading~~ *lading* is drawn against those goods will not of itself give a charge upon them, and the words "which place to account cargo per the A——," will not give a lien on that cargo (50).

The right of a wife to pledge her husband's credit as a means of procuring necessities for her support, when the husband fails to make proper provision for her, does not extend to validate a sale by her of her husband's chattels, nor to give her any lien thereon (51).

An auctioneer has no lien on maps left with him to aid in the sale of land (52).

(47) *Darke v. Williamson* 25 Beav. 622.

(48) *Madden v. Kempster* 1 Camp. 12.

(49) *Chapman v. Allen* Cro. Car. 271; *Jackson v. Cummins* 5 M. & W. 342.

(50) *Brown v. Kough* (1885) L.R. 29 Ch.D. 845; *Robey v. Ollicr* (1872) L.R. 7 Ch. 695; *Phelps v. Comber* (1885) L.R. 29 Ch. D. 813.

(51) *Kieley v. Morrison* (1892) 24 N.S.R. 327; *Edgerly v. Whalen* 106 Mass. 307.

(52) *Blackburn v. Macdonald* 6 U.C.C.P. 380.

There is no lien as against goods the property of the Crown (53).

A banker with whom a customer leaves for safe-keeping a box containing securities, to which the customer has sole access, and keeps the key, has no lien for a general balance due from the customer (54).

The Crown has no preferential lien upon the assets of an insolvent estate in the hands of the assignee for creditors in respect of customs duties on goods previously imported and sold by the insolvent, as a writ of extent for the Crown debt would only have effect on property owned by the debtor at the time of the issue of the writ (55).

A sheriff has in Ontario no lien for his fees on goods seized under a writ of *fieri facias* (56).

And in the absence of an agreement there is no lien in favor of a landlord, unless he is an innkeeper, upon chattels left on his premises by an outgoing tenant (57).

Lien of finder of lost chattel.—The finder of a chattel has at common law no lien upon it for a recompense in respect of his trouble in securing it, and in taking care of it for the owner (58); but he is entitled to be paid his reasonable expenses incurred in respect of the thing found (59). And the owner of a boat which is found adrift on tidewater and is brought to shore is

(53) *The Queen v. Fraser* 2 R. & C. (Nova Scotia) 431.

(54) *Leese v. Martin* L.R. 17 Eq. 234.

(55) *Clarkson v. Attorney General* (1889) 16 Ont. App. 202.

(56) *Re Ross* 3 Ont. Pr. 394.

(57) *Preston v. Neale* 12 Gray (Mass.) 222.

(58) *Nicholson v. Chapman* 2 H.Bl. 254.

(59) *Chase v. Corcoran* 106 Mass. 286; *Armory v. Flynn* 10 Johns. (N.Y.) 102.

liable for the necessary expenses of keeping and repairing the boat while it remained in the possession of the finder. The law implies in such a case a promise by the owner that upon taking it from the person who had found it adrift, he will pay for the necessary expenses of its preservation (60).

If, however, the owner of a lost chattel offers a reward for its return, the finder has a lien upon the property for the payment of the reward. Such an offer is to be construed as meaning that the person who has expended his time and money in the pursuit and recovery of the lost or escaped property should remain in possession of the same as security for the payment of the proffered reward until its restoration to its owner, and that then the payment of the reward would be a simultaneous act; the lien is, therefore, one arising out of contract (61).

But there is no lien implied by an offer so indefinite as of a 'liberal reward,' as it cannot be supposed that the owner, by his offer, intended that he was to be kept out of the possession of his property till the just amount in case of disagreement could be ascertained in legal proceedings (62).

Where a part only of lost money is recovered, the finder will be entitled to a *pro rata* proportion of the reward, unless the offer be in terms which exclude any apportionment (63).

A lien by the finder of a lost chattel for the reward

(60) *Chase v. Corcoran* 106 Mass. 286.

(61) *Wilson v. Guyton* 8 Gill (Md.) 213; *Wentworth v. Day* 3 Met. (Mass.) 352; *Preston v. Neale* 12 Gray (Mass.) 222; *Wood v. Pearson* 45 Mich. 313.

(62) *Wilson v. Guyton* 8 Gill (Md.) 213; *Shuey v. United States* 92 U.S. 73.

(63) *Symmes v. Frazier* 6 Mass. 344.

offered is not waived by insisting on its identification (64).

Stolen property.—The purchaser of stolen goods ordinarily takes no title to the same and has no lien in respect of the purchase price he has paid, although he made the payment in the bona fide belief that the seller owned the goods. An express power to order restitution in a criminal prosecution in respect of the theft is conferred by the Criminal Code of Canada (1892), section 838 of which enacts that :

"If any person who is guilty of any indictable offence in stealing, or knowingly receiving, any property, is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, or is tried before a judge or justice for such offence under any of the foregoing provisions [of the Code] and convicted thereof, the property shall be restored to the owner or his representative."

"2. In every such case the court or tribunal before which such person is tried for any such offence, shall have power to award, from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner ; and the court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence although the person indicted is not convicted thereof, if the jury declares, as it may do or if, in case the offender is tried without a jury it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such offence."

But it is also provided by the Code that the section mentioned shall not apply to the case of any prosecu-

(64) *Wood v. Pierson* 45 Mich. 313, 7 N.W. Rep. 888.

tion of any trustee, banker, merchant, attorney, factor, broker, or other agent *entrusted with the possession* of goods or documents of title to goods, for the fraudulent disposal by a person holding a power of attorney, or for the fraudulent misappropriation of goods or their proceeds held under direction (65), or to the prosecution of a trustee for fraudulent conversion of property (66).

And if it appears before any award or order is made, that any valuable security has been bona fide paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been bona fide taken or received by transfer or delivery, by any person, for a just and valuable consideration without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court or tribunal shall not award or order the restitution of such security or property.

When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court, by the evidence, that the prisoner sold such property, or part of it, to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner (if it is his) a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser (67).

(65) Cr. Code 838 (4), 320.

(66) Cr. Code 838 (4), 363.

(67) Cr. Code, sec. 837.

The power of ordering restitution on the criminal prosecution is limited to property identified at the trial as being the subject of the charge (68); the power extends as well to the proceeds of property as to the property itself (69).

Where a robbery has been committed in a foreign country and the money stolen has been invested in the purchase of chattels in this country, the court will, at the suit of the true owner, intervene to secure the money for him by holding him entitled to a lien on the goods purchased with the stolen money or by adjudging the goods to be his in equity, and will grant an injunction to restrain the selling or encumbering of the chattels until the trial (70).

Waiver and forfeiture. A possessory lien on a chattel is discharged by tender of the debt (71).

The tender should be of the exact amount in money, but if a larger sum is produced and change asked for, and the tender is refused on the ground that the amount offered is insufficient, and without objection to the quality of the tender, an objection on the latter ground will be waived (72).

The money should be actually produced (73), but this may be dispensed with by the express declaration or other equivalent act of the creditor, if the tender be otherwise sufficient (74). But it is not a sufficient

(68). *R. v. Goldsmith* 12 Cox C.C. 594; *R. v. Smith* 12 Cox C.C. 597.

(69) Cr. Code 3 (7): *R. v. Justices, etc.*, 18 Q.B.D. 314.

(70) *Merchants' Express v. Morton* 15 Grant (Ont.) 274.

(71) *Bank of N.W.S. v. O'Connor* 14 A.C. 273.

(72) *Biddulph v. St. John* 2 Sch. & Lef. 521.

(73) *Dickinson v. Shee* 4 Esp. 67.

(74) *Thomas v. Evans* 10 East, 101; *Ex. p. Danks* 2 DeG. M. & G. 936.

tender for an agent of the debtor to say that the money has been left with him for payment of the debt, if he does not offer it (75). The tender must not be clogged with a condition, as that the payment shall be taken as the balance due (76), or that a receipt in full be given in return (77); but an objection on account of the condition will be waived by the refusal simply on the ground that the amount is insufficient (78).

The fact that the amount in respect of which a lien is claimed is in excess of the amount legally due, does not dispense with the necessity of a tender of the amount legally due nor invalidate the lien (79).

Where the holder of goods detains them for different claims, as to one of which he has a lien, and as to the others he has not, the owner must tender the proper amount unless the detaining party either expressly or by fair implication dispenses with it (80).

If the lien holder enter into a special contract for a particular mode of payment inconsistent with a lien, the lien will be waived (81); but if the contract does not affect the possession held by the creditor and is not in discharge of the debt it is not necessarily inconsistent with a continuance of the lien (82).

(75) *Thomas v. Evans* 10 East, 101.

(76) *Evans v. Judkins* 4 Camp. 156.

(77) *Glascott v. Day* 5 Esp. 48.

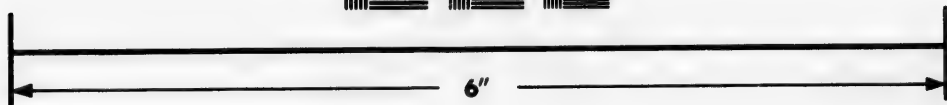
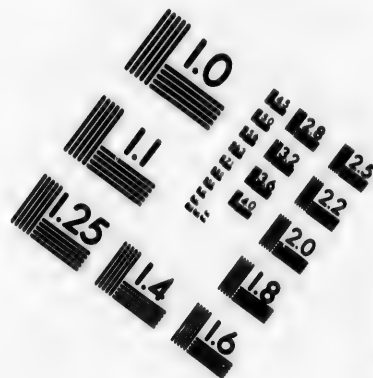
(78) *Cole v. Blake* Peake's Rep. 179.

(79) *The Queen v. Hollingsworth* (1899) 2 Can. Cr. Cas. 591, per Rouleau, J.

(80) *Kendall v. Fitzgerald* 21 U.C.R. 585; *Buffalo and Lake Huron v. Gordon* 16 U.C.R. 283; *McBride v. Bailey* 6 U.C.C.P. 523.

(81) *Baker v. Dewey* 15 Grant (Ont.) 668; *Dempsey v. Carson* 11 U.C.C.P. 462; *Hewison v. Guthrie* 2 Bing. N.C. 755; *Brownlow v. Keating* 2 Ir. Eq. R. 243.

(82) *Re London & Birmingham Bank* 11 Jurist N.S. 316.



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A lien will be lost if the lien holder claim to retain the goods for the debt of another than the rightful owner (83), or under another right than the right of lien (84).

If there be a specific lien, but the holder claims to hold the goods also for a general balance he does not thereby waive his lien (85), but no objection can in that case be made by the holder that he was not tendered the sum due on the specific lien (86).

If the holder of the lien takes the goods in execution, and causes them to be sold by the sheriff and becomes the purchaser from him, his lien is gone for he holds as a purchaser and not by right of lien although his actual possession was not interrupted (87).

Liens in Quebec—Privileges.—Under the Civil Code of the Province of Quebec, which is based upon the civil law and the Code Napoleon, "privilege" is a right which a creditor has of being preferred to other creditors according to the origin of his claim. It results from law and is indivisible of its nature (88).

The claims which carry a privilege upon movable property in the Province of Quebec are the following, and where several of these come together they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom (89):—

(83) *Dirks v. Richards* 6 Jur. 562, Car. & M. 626.

(84) *Weeks v. Goode* 6 C.B.N.S. 367; *Boardman v. Sill* 1 Camp. N.P. 410, n.

(85) *Scarfe v. Morgan* 4 M. & W. 270.

(86) *Jones v. Tarlton* 6 Jur. 349, 9 M. & W. 675.

(87) *Jacobs v. Latour*, 5 Bing. 130.

(88) Quebec Civil Code, art. 1983.

(89) Quebec C.C., art. 1994, 1997.

1. Law costs and all expenses incurred in the interest of the mass of the creditors ;
2. Tithes. These constitute a lien or privilege against such crops as are subject to them ;
3. The claims of the vendor ;
4. The claims of creditors who have a right of pledge or of retention ;
5. Funeral expenses (including the mourning of the widow) suitable to the station and means of the deceased ;
6. The expenses of the last illness ; but in cases of chronic disease the privilege avails only for the expenses during the last six months before the decease (90) ;
7. Municipal taxes limited to the taxes on persons and personal property imposed by certain municipalities, and taxes to which a like privilege is attached by special statutes ;
8. Rent ;
- 8 (a). The owner of a thing who has lent, leased or pledged it, and who has not prevented its sale, has a right to be paid the proceeds of its sale after the preferential claims for law costs and expenses, and for rent, have been collected. The owner of a thing which has been stolen, who would not have lost his right to revendicate it had it not been judicially sold, has a similar right (91).
9. Servants' wages and those of employees of railway companies engaged in manual labour, and sums due for supplies of provisions.

The lien of domestic servants and hired persons is upon all the movable property of the debtor, but

(90) Quebec C.C., art. 2003.

(91) Quebec C.C., art. 1994. 2005*u*.

limited to wages for a period not exceeding one year previous to the time of the seizure or of the death (92).

Clerks, apprentices and journeymen are entitled to a preference for wages for a period of arrears not exceeding three months, but limited to the merchandise and effects contained in the store, shop or workshop in which their services were required. Employees of railway companies engaged in manual labour have a lien upon all the movable property of the company for arrears not exceeding three months (93).

10. The claims of the Crown against persons accountable for its moneys (94).

The privileges specified under the numbers 5, 6, 7, 9 and 10 extend to *all* the movable property of the debtor, the others are special and affect only some particular objects.

Those who have supplied provisions to a household have a similar privilege to that of domestic servants for wages, under Quebec law, upon all the movable property of the debtor for the supplies furnished during the preceding twelve months (95).

Mutual fire insurance companies also have a privilege upon the movable property of the insured for the payment of assessments which may be imposed on the deposit notes of the members, which privilege takes rank immediately after municipal taxes and rates, and remains in force for the same time (96).

Priorities of rights of retention—Quebec.—Creditors having a right of pledge or of retention rank

(92) Quebec C.C. art. 2006.

(93) Quebec C.C. art. 2006; 59 Vict. (Que.), c. 41, s. 2.

(94) Quebec C.C. art. 1994.

(95) Quebec C.C. art. 2006.

(96) Quebec C.C. art. 1994 *ib.*; R.S.Q. art. 5826; 45 Vict. (Que.), c. 51, s. 49; 47 Vict. (Que.), c. 76, s. 2.

according to the nature of their pledge or of their claim.

The following is the order among them :—

1. Carriers ;
2. Hotelkeepers ;
3. Mandatories or Consignees ;
4. Borrowers in loan for use ;
5. Depositaries ;
6. Pledgees ;
7. Workmen upon things repaired by them, and persons having a privilege in virtue of article 1994, *c.* of the Civil Code.
8. Purchasers against whom the right of redemption is exercised, for the reimbursement of the price and the moneys laid out upon the property. This privilege cannot, however, be exercised unless the right is still subsisting or could have been claimed at the time of the seizure, if the thing has been sold (97).

(97) Quebec Civil Code, art 2001 ; 60 Vict. (Que.), c. 50, s. 34.

CHAPTER VII.

SELLER'S LIEN FOR PRICE.

Rights of unpaid seller.—Notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—(a) A lien on the goods or right to retain them for the price while he is in possession of them (1). (b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them; (c) A right of re-sale in certain cases on the purchaser's default.

Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu*, where the property has passed to the buyer (2).

When there is no actual agreement as to price or time of payment, the presumption of law is that the buyer is to pay a reasonable price, and in the absence of evidence to the contrary a promise is implied to pay on delivery (3).

Seller's lien for price.—The unpaid seller of goods who is in possession of them is (4) generally entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(1) *Dixon v. Yates* (1833) 5 B. & Ad. 313.

(2) *Lord v. Price* (1874) 9 Ex. 54.

(3) *Christie v. Burnett* 10 Ont. R. 609.

(4) *Martindale v. Smith* (1841) 1 Q.B. 389; *Bloxam v. Saunders* 4 B. & C., 948.

- (a) Where the goods have been sold without any stipulation as to credit; (b) Where the goods have been sold on credit, but the term of credit has expired; (c) Where the buyer becomes insolvent.

Where goods remain in the possession of the vendors and no actual delivery has been made to the vendee, the vendor's lien will revive on the insolvency of the vendee although the goods are held by the vendors as warehousemen for the vendee (5). And it is not imperative for the exercise of this right that there should first be a judicial finding of insolvency (6).

If the purchaser has agreed with the vendor to pay certain duties on the goods and these are afterwards properly paid by the vendor, the vendor's lien will cover the amount of such duties (7).

The vendor's lien arises out of his original ownership and dominion over the goods and is independent of actual possession by the vendor so long as actual possession has not been obtained by the vendee, and payment or a tender of the price is a condition precedent on the buyer's part before the making of which he has no right to the possession (8).

The vendor's lien is in that respect different from other possessory liens, the claimants of which have no other title than the possession of the chattel upon which the lien is claimed. The passing of the property in cordwood does not vest the right of possession without payment of the price, which by the contract was to be paid in cash on the final measurement, after piling ready to be loaded on railway cars;

(5) *Grice v. Richardson* (1877) 3 App. Cas. 319.

(6) *The Tigress* (1863) 32 L. J. Adm. 97.

(7) *Winks v. Hassall* 9 B. & C. 372.

(8) *Bloxam v. Saunders* (1825) 4 B. & C. 941, 948.

and the lien for unpaid purchase money will subsist after the wood has been marked with the purchaser's mark in the presence of the parties, after the measurement has been agreed upon (9).

The lien overrides any lien which may exist against the purchaser, or against a purchaser from him, although the latter may have paid the original purchaser for the goods (10).

Factors and brokers and persons who buy for others at their own risk, drawing bills upon them for the value of the goods and the commission, are entitled to a lien as vendors (11), and by statute in Manitoba any person who is in the position of a seller, as, for instance, an agent of the seller, to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid or is directly responsible for the price, has the like rights as a seller would have to exercise a right of detention or lien (12).

When the property passes.—The time at which the property in goods contracted to be sold passes to the buyer is governed by the following rules:—Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained (13).

When there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract

(9) *Rogers v. Devitt* (1894) 25 Ont. R. 84.

(10) *Dixon v. Yates* 5 B. & Ad. 313.

(11) *Drinkwater v. Goodwin* 1 H. Cowp. 251; *Feise v. Wray* 3 East, 93; *Imp. Bank v. Docks Co.* 5 Ch. D. 195.

(12) Sale of Goods Act, Man. 1896, c. 25, s. 36 (2).

(13) *Dixon v. Yates* (1833) 5 B. & Ad. 313; *Godts v. Rose* (1855) 17 C.B. 229; *Mirabita v. Imperial Ottoman Bank* (1878) 3 Ex. D. 164, 172.

intend it to be transferred. For the purpose of ascertaining the intention of the parties regard is to be had to the terms of the contract, the conduct of the parties and the circumstances of the case (14).

Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract is to vest the property in the bargainee (15).

When a contract is made for the sale of a certain portion of a specific mass of goods, no title passes to the buyer until appropriation of a certain portion to that contract (16). But if it appears to be the intention of the parties that title shall pass, it will pass (17).

A sale was made of not less than 1,600 nor more than 2,300 bushels of corn at a certain price per bushel and part of the purchase money paid, the corn being in two cribs, one containing 1,600 bushels and the other about 700 bushels, and it was agreed that the vendor reserved a right to retain 200 or 300 bushels if required. A third party was entitled to 50 bushels from the stock mentioned. It was held that as to 1,600 bushels title had passed to the purchaser, and on the entire mass being destroyed by fire the loss as to that portion fell on him (18).

(14) *Seath v. Moore* (1886) 11 App. Cas. 350, 370.

(15) *Dixon v. Yates* (1833) 5 B. & Ad. 313, 340.

(16) *Campbell v. Mersey Dock Co.* 14 C.B.N.S. 412.

(17) *Kimberley v. Patchin* 19 N.Y. 330.

(18) *Welch v. Spier* (Iowa) 72 N.W. Rep. 548.

In a recent case (19) the facts were, that the defendant H. had over 4,000,000 feet of lumber in a yard in Rockland, Ont., and sold 1,500,000 feet through an agent to L. of Montreal, on six months' credit, ratifying the sale by a letter to the owners of the yard as follows :

Montreal, 12th Jany., 1887.

Messrs. W. C. Edwards & Co., Rockland, Ont.

Gentlemen, — You will please ratify Mr. Lemay's order for one million feet 3 mill culls, 8-13 feet, and 493,590 feet 3 mill culls, 14-16 feet, sold to Mr. William Little, f.o.b. of barges with option to draw them from the piles, if he wants some during winter.

Yours truly,

(Sgd.) N. Hurteau et Frere.

A few days after the sale the agent gave an order on the owners of the yard for delivery of the lumber to L., which order was accepted by the owners. L. had given a six months' note for the price of the lumber, and just before it matured he asked defendants to renew which they refused, and, on L. saying that he could not pay the defendant replied that he must keep his lumber, whereupon he was informed by L. of his agreement with the plaintiff made about a month after the purchase from the defendant, by which he pledged to plaintiff the warehouse receipt for the lumber as collateral security for advances to him by plaintiff. On the trial of an interpleader issue to determine the title to this lumber it was shown by the evidence that the quantity sold to L. had never been separated from the defendant's lot in the yard, and that defendant had always kept it insured considering it his until paid for. It was held by the Supreme Court of Canada, affirming the judgment of the Court of Appeal, Strong and

Gwynne, J.J., dissenting, that the property in the lumber never passed out of H. the defendant (20).

Transfer under Factors' Act—Ontario. By the Ontario Act (21) respecting contracts in relation to goods entrusted to agents (commonly known as the Factors' Act), all contracts pledging or giving a lien upon any bill of lading, warehouse keeper's or wharfinger's receipt or order for delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, shall be deemed a pledge of and lien upon the goods to which it relates, and the agent shall be deemed the possessor of the goods or documents of title whether the same are in his actual custody or are held by any other person for him or subject to his control (22); but the contract must have been made bona fide and without notice that the agent entrusted with the document of title and making the contract or pledge had no authority so to do, or that he was acting mala fide against the owner of the goods (23). Knowledge that such agent was not himself the owner of the goods will not defeat the claim of the pledgee (24). But an antecedent debt owing from a mercantile agent to another party will not authorize any lien or pledge by the agent to such party in respect of such debt (25)

(20) *Ross v. Hurteau* (1890) 18 Can. S.C.R. 713.

(21) R.S.O. 1897, c. 150.

(22) Sec. 7.

(23) Sec. 9.

(24) Sec. 10.

(25) R.S.O. 1897, c. 150, s. 8.

To constitute a person an 'agent' within the Ontario Factors' Act his employment must correspond to some known class of commercial agent, such as the class of factors or commission merchants, and the Act does not apply to the case of a person entrusted with the possession of the goods simply for the purpose of carrying out a particular transaction of sale, if such person does not make a business of selling goods for others (26).

The person who is to give a title as against the principal or owner of the goods must be an agent; if he has no right to the possession as agent, the provisions of the Factors' Act as to pledging do not apply to him (27). And an agent whose authority has been revoked, and who wrongfully retains possession of goods which he is bound to give up at the time when he purports to make a pledge, is not an agent at all, but a wrongdoer, and is not within the Act, nor is the pledge a transaction within its protection (28). And where a vendee of tobacco left the possession and control of the documents representing the tobacco in the power of his vendor, as his agent for the purpose of forwarding the tobacco to him or to his order, and the vendor was, in accordance with the practice of the trade, left in possession of the goods in bond so as to avoid premature payment of duty, undertaking to clear and forward the goods for the plaintiff as required, the vendor is not in law or in fact intrusted as an agent qua sale or pledge of, or dealing of any kind in, the goods (29).

Where it is proved that such a trade custom exists, and that it is exceptional to do otherwise, it is not

(26) *Bush v. Fry* (1887) 15 Ont. R. 122.

(27) Per Willes J. in *Fuentes v. Montis* (1868) L.R. 3 C.P. 268, 282.

(28) *Ibid.* p. 284.

(29) *Johnson v. Credit Lyonnais Co.* (1877) L.R. 3 C.P.D. 32, 49.

negligence on the purchaser's part to omit to have the goods transferred into his own name at the warehouse, or to have the delivery orders transferred to himself; and no estoppel arises notwithstanding the fact that the vendor's line of business was to sell that class of goods (30). The Ontario Factors' Act is similar in its provisions to the Factors' Act 5 and 6 Vict. (Imp.), c. 39, which has since been repealed in England.

Pledge by vendor in possession British Columbia, N.W. Territories and Manitoba.—In British Columbia

and the North West Territories it is enacted that where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same (31).

The only case in which the seller is placed, by virtue of this enactment, in the position of being authorized by the owner to make a pledge, etc., of the goods is where he 'continues or is in possession' of the same or of the documents of title. In such cases the Act makes authoritative the delivery or transfer of the goods or documents of title to a person receiving the same in good faith; and there must, therefore, be some delivery or transfer after the sale,

(30) *Johnson v. Credit Lyonnais* L.R. 3 C.P.D. 32.

(31) The Factors' Act, R.S.B.C. 1897, c. 4, s. 9; The Factors' Ordinance, Con. Ord. N.W.T. 1898, c. 40 s. 9.

without notice that such sale had taken place. So where a merchant sold wine stored in the cellars of a warehouseman, and afterwards pledged the wine to the warehouseman for advances made in good faith without notice of the sale, it was held, under a similar enactment, that the pledge conferred no title to the wine (31*a*). In that case the pledgees were themselves in possession of the goods long before the sale, and there had been no alteration in the possession, nor was there any 'document of title'. To satisfy the Act there must be a delivery of the goods by the seller in possession, or where there is no delivery of the goods, the transfer of documents of title; and where there are no documents of title, and no delivery at, or subsequent to the sale, the pledgee is not protected (31*b*).

By the Manitoba Sale of Goods Act, 1896 (31*c*) it is enacted, that where a person, having sold goods, continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

This provision, it will be observed, is similar to the enactments in force in British Columbia and the Territories, with the exception that the Manitoba statute does not contain the words referring to an *agreement for sale, pledge or other disposition, and,*

(31*a*) *Nicholson v. Harper* (1895) 2 Ch. 415, per North, J.

(31*b*) *Nicholson v. Harper* (1895) 2 Ch. 415, 418.

(31*c*) Stat. Man. 1896, c. 25, s. 24 (1).

in consequence, it applies only where there has been an actual sale-pledge or other disposition of the goods by the seller.

Property passing—Ascertainment of intention.—

The following rules governing the passing of the property and the inferences of law, where a different intention does not appear, are given in the Imperial Sale of Goods Act of 1893 (32), and are declaratory of the law before that Act.

Rule 1.—When there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed. Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof. Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof. Rule 4.—When goods are delivered to the buyer on approval or “on sale or return” or other similar terms the property therein passes to the buyer:—(a). When he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b). If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods,

(32) 56 and 57 Vict. (Imp.) c. 71, s. 18.

on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact (33). Rule 5.—(a). Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made: (b). Where in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Where a person sold timber to A. and received from him a payment on account; but the timber was to be culled and measured to complete the purchase, and A. did not cull or measure it nor pay the balance, it was held that the property never passed to A. so as to prevent the vendor from re-selling (34).

The return where no time has been fixed, and the goods are sent on approval or on 'sale or return', is to be made within a reasonable time from the receipt of the goods (35).

Where goods are sent by manufacturers to a person to be sold by him and he pays for such of them as he has sold, by periodical settlements at trade prices, (he

(33) *Moss v. Sweet* (1851) 16 Q.B. 493, 15 Jur. 536; *Ornstein v. Alexandra* (1895) 12 Times L.R. 128.

(34) *Paton v. Currie*, 19 U.C.R. 388.

(35) *Jacobs v. Harbach* (1886) 2 Times L. Rep. 419.

being at liberty to deal with the goods as he pleases), he is in the position of a person having goods on 'sale or return,' and the relationship between him and the manufacturers is that of vendor and purchaser, and not of principal and agent (36).

If goods are forwarded on sale or return and the receiving party pawns or pledges them, the vendor cannot recover them from the pledgee as the pawning of goods is an act 'adopting the transaction' and the property then passes to the conditional vendee (37).

Sale on approval—British Columbia, N.W. Territories, and Manitoba.—By the Sale of Goods Acts, of British Columbia and Manitoba, and the Sale of Goods Ordinance of the North West Territories (38), if goods are delivered to the buyer on approval, or 'on sale or return,' or other similar terms, the property therein passes to the buyer—(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction: (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Implied warranty of title.—A pawnbroker is not presumed on selling a pawned article to warrant the title to same; the only warranty that can be implied from the nature of his occupation, is that the subject

(36) *Ex parte White* (1870) 21 W.R. 465, L.R. 6 Ch. App. 397.

(37) *Kirkham v. Attenborough* (1897) 1 Q.B. 201, 41 Sol. Jour. 141, 13 T.L.R. 131.

(38) R.S.B.C. 1897, c. 169, s. 23; Stat. Man. 1896, c. 25, s. 18; Con. Ord. N.W.T. 1898, c. 39, s. 20.

of the sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it (39). But if articles are bought in a shop professedly carried on for the sale of goods, the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells *as his own*, and that is equivalent to warranty of title (40), and the same rule will apply to the sale of a specific chattel in the possession of the vendor at the time of the sale, and it will be assumed that the vendor is selling *as his own* unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold (41).

If the purchaser knows at the time of purchasing that there is a defect in the vendor's title, no warranty can be implied (42).

In all ordinary sales of goods the vendor, by offering it for sale, thereby leads the purchaser to believe that he is the owner; but this applies only to ordinary cases, and not where the vendor is acting in any special character, such as mortgagee or pledgee, or sale by a sheriff under execution, provided the vendor does not by word, act, or deed, give the purchaser to understand that he is selling the goods, and not merely his interest or title therein; and if the transaction is a sale by a pledgee with the concurrence of the pledgor and not a mere transfer of the pledgee's

(39) *Morley v. Attenborough* 3 Ex. 500.

(40) *Eichholz v. Bannister* 17 C.B.N.S. 708; *Raphael v. Burt* 1 C. & E. 325.

(41) *Dickie v. Dunn* (1887) 1 N.W.T. Rep. 12 (part I.).

(42) *Turriff v. McHugh* (1889) 1 N.W.T. Rep. 112 (part I.); *Cundy v. Lindsay* L.R. 3 A.C. 459.

interest under a bill of lading, there is an implied warranty of title by the pledgee (43).

A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it can be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership but only to transfer such interest as he might have in the chattel sold (44).

Re-sale by vendor.—Where the goods are of a perishable nature the unpaid seller may without notice re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract (45).

Lumber and deals exposed to the weather and liable to deterioration under circumstances in which they cannot be stored are 'perishable property' (46).

If the buyer becomes insolvent and his assignee in insolvency, or a sub-purchaser from the debtor, does not tender the price of the goods to the seller who is in possession of them, within a reasonable time, the seller may treat the contract as rescinded without tendering the goods to the assignee, and may also claim against the insolvent estate for damages (47).

Where the unpaid vendor exercising his right of lien or retention gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the

(43) *Peuchen v. Imperial Bank* (1890) 20 Ont. R. 325; *Morley v. Attenborough* 3 Ex. 500 distinguished.

(44) *McFatridge v. Robb* (1892) 24 N.S.R. 506.

(45) *Maclean v. Dunn* 4 Bing. 722.

(46) *Bank of Nova Scotia v. Ward* (1888) 21 N.S.R. 230.

(47) *Ex parte Stapleton* (1879) 10 Ch. D. 586.

original buyer damages for any loss occasioned by his breach of contract (48).

Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee; but otherwise the right of lien is not affected by any sale or other disposition of the goods, which the buyer may have made, unless the seller has assented thereto (49).

Reserving right of disposal.—Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms or the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled (51).

When goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve

(48) *Maclean v. Dunn* (1828) 4 Bing. 722, 728.

(49) *Dixon v. Yates* 5 B. and Ad. 313.

(51) *Schotsmans v. Lanc. & York. Ry. Co.* (1867) 1 L. Ch. App. 332; *Ogg v. Shuter* (1875) 1 C.P.D. 47.

the right of disposal. If from all the facts it may fairly be inferred that the bill of lading was taken in the name of the seller in order to retain dominion over the goods, that shows that there was no intention to pass the property, but if the whole of the circumstances lead to the conclusion that that was not the object, the form of the bill of lading has no influence on the result (52).

When the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him (53).

Although the fact of the goods being made deliverable by the bill of lading to the shippers' order *prima facie* indicates that they intended to reserve the right of transferring the goods, it is not conclusive (54).

Ordinarily a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention (55), but if the seller has in the contract of sale expressly reserved a right of re-sale in case the buyer should make default, and he re-sells the goods on such default, the contract is rescinded, but without prejudice to any claim the seller may have for damages (56).

(52) *Joyce v. Swann* (1864) 17 C.B.N.S. 84; *Wait v. Baker* (1848) 2 Ex. 1; *Browne v. Hare* 4 H & N. 822.

(53) *Shepherd v. Harrison* (1871) L.R. 5 H.L. 116; B.C. Sale of Goods Act R.S.B.C. 1897, c. 169, s. 24 (3); Sale of Goods Ordinance, Con. Ord. N.W.T. 1898, c. 39, s. 21 (3); Sale of Goods Act (Man.) 1896, sec. 19 (3).

(54) *Pugh v. Wylde* 2 R. & C. (Nova Scotia) 177.

(55) *Martindale v. Smith* (1841) 1 Q.B. 386, 396.

(56) *Maclean v. Dunn* 4 Bing. 722.

Reserving right of disposal—British Columbia, N.W. Territories and Manitoba.—By statute in British Columbia, Manitoba, and the North West Territories (57), where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled; and where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the agent is *prima facie* deemed to reserve the right of disposal. In these provinces it is also provided that where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages (59).

Waiver of vendor's lien.—A vendor's lien is not defeated by part payment of the price (60), or by recovery against the purchaser in an action for goods sold (61). But if the vendor give to the purchaser a warrant in a form which, by the custom of a particular trade, implies that the goods are free from any claim

(57) R.S.B.C. 1897, c. 169, s. 24; Stat. Man. 1896, c. 25, s. 19; Con. Ord. N.W.T. c. 39, s. 21.

(59) Stat. Man. 1896, c. 25, s. 45 (4); R.S.B.C. 1897, c. 169, s. 58 (4); Con. Ord. N.W.T. 1898, c. 39, s. 40 (4).

(60) *Hodgson v. Loy* 3 T.R. 440; *Feise v. Wray* 3 East, 93.

(61) *Houlditch v. Desanges* 2 Stark. 337.

for vendor's lien, or, if he give the purchaser documents which state expressly that the goods are held and deliverable to his order or to the holder of the document (62), there is no lien.

Parting with possession of goods on a false representation will not annul the lien, and the lien holder who has been deprived of the possession by the fraud of the purchaser may recover them from him in trover, or, if he can, may re-possess himself of them (63).

The actual delivery of part of the goods may import a constructive delivery of the whole, where there appears to have been no intention, either before or at the time of the delivery, to separate that part from the rest (64); but if it can be shown that there was an intention not to deliver the whole, but to separate the part delivered from the residue, the lien on the residue will hold (65).

If the vendor inadvertently and without any intention of parting with possession, allow the purchaser to get possession of the chattel upon a cash sale before he has paid the price, that will not deprive the vendor of his title (66).

The seller loses his lien or right of detention (except as to the right of stoppage in transitu, if the buyer becomes insolvent) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods (*ex. gr.* by making shipment to his own

(62) *Merchant Banking Co. v. Phoenix Steel Co.* 5 Ch. D. 205.

(63) *Tyson v. Cox*, T. & R. 395; *Wallace v. Woodgate* 1 Car. & P. 575, Ry. & M. 193; *Richards v. Symons* 8 Q. B. 90, 15 L.J.Q.B. 35.

(64) *Slubery v. Heyward* 2 H. Bl. 504; *Hammond v. Anderson* 1 B. & P.N.R. 69; *Tanner v. Scovell* 14 M. & W. 28, 37.

(65) *Bunney v. Poyntz* 4 B. & Ad. 568; *Valpy v. Oakeley* 16 Q.B. 941; *Ex. p. Cooper* 11 Ch. D. 68; *Kemp v. Falk* 7 App. Cas. 573.

(66) *Miller v. Jones* 66 Barb. (N.Y.) 148.

order); but not by reason only that he has obtained judgment for the price of the goods (67).

As long as the goods remain in the warehouse of the vendor, or in the hands of one who holds as his agent, his lien upon them for the unpaid price remains. But, when once they have got into the possession of an agent for the buyer, the vendor parts with his lien (68).

A seller's lien is not lost by his charging the purchaser with warehouse rent on account of the goods (69).

The effect of a charge for warehouse rent by the vendor against the purchaser is to be considered as a notification to the purchaser that he is not to have the goods until payment of both the rent and the price, and the right of the vendor in such a case is just the same whether the goods had been specifically appropriated for the fulfilment of the contract or not (70).

The removal of the goods by the sellers after the buyers refused to accept them, to a place not contemplated by the contract where they could be better taken care of, will not put an end to the lien (71).

And if, while the vendor's lien subsists, the parties enter into a new agreement which provides for a mode of payment inconsistent with the continuance of the lien, it will constitute a waiver of the same (72).

The vendor also waives his lien by causing the goods to be seized and sold under an execution against the purchaser at his own suit, although he purchases

(67) *Scrivener v. Great Northern* (1871) 19 W.R. 388.

(68) *Bolton v. Lanc. & York. Ry.* (1866) L.R. 1 C.P. 431; 35 L.J.C.P. 137.

(69) *Grice v. Richardson* 3 App. Cas. 319.

(70) *Griffiths v. Perry* 1 E. & E. 680.

(71) *McLachlan v. Kennedy* (1889) 21 N.S.R. 271.

(72) *Rait v. Mitchell* 4 Camp. 146.

the goods under the execution and they are not removed from his premises, for, in order to sell, the sheriff must have had possession, and after he has had possession with the assent of the person claiming the lien, the subsequent possession of the lien holder must be taken to have been acquired under the sale (73).

British Columbia, N.W. Territories and Manitoba Sale of Goods Acts.—The law relating to the sale of goods, and to the rights of an unpaid seller against the goods, has been codified in the provinces of British Columbia and Manitoba, and in the North-West Territories. The statutes referred to are as follows: The British Columbia Sale of Goods Act, R.S.B.C. 1897, c. 169, the Manitoba Sale of Goods Act of 1896 (74), and the Sale of Goods Ordinance of the North-West Territories passed in 1896 (75), now chapter 39 of the Consolidated Ordinances, N.W.T., 1898.

These are all patterned after the Imperial Sale of Goods Act of 1893 (76). Under these statutes the seller of goods is deemed to be an "unpaid" seller (77):—(a) when the whole of the price has not been paid or tendered; (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

The term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the

(73) *Jacobs v. Latour* 5 Bing. 130.

(74) Stat. Man. 1896, c. 25.

(75) Ord. N.W.T. No. 10 of 1896.

(76) 56 & 57 Vict. (Imp.) c. 71, s. 62.

(77) Stat. Man. 1896, c. 25, s. 36 (1); R.S.B.C. 1897, c. 169, s. 49; Con. Ord. N.W.T. c. 39, s. 37.

seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price (78). The definition will include not only the seller's agent to whom the bill of lading has been endorsed, and who, therefore, has a special property in the goods (79), but also a consignor or agent buying goods on his own credit and consigning them to his principal (80), and a buyer who re-sells his interest under an agreement to sell goods, although the property in the goods has not vested in him at the time of the exercise of the right (81); but a surety for the buyer can only exercise the lien through the seller and in the seller's name, although he has paid the price (82).

If, during the currency of a negotiable instrument received as conditional payment, and before the delivery actually takes place, the purchaser becomes openly insolvent, the vendor retains his lien for the law does not compel him to deliver to an insolvent purchaser (83).

Rights of unpaid seller—B.C., N.W.T. and Manitoba.—By the Sale of Goods Acts before mentioned, it is declared that, subject to the provisions of any statute in that behalf and notwithstanding that the property in the goods may have passed to the

(78) Stat. Man. 1896, c. 25, s. 36 (2); R.S.B.C. 1897, c. 169, s. 49 (2); Con. Ord. N.W.T. c. 39, s. 37 (2).

(79) *Morison v. Gray* (1824) 2 Bing. 260.

(80) *Hawkes v. Dunn* (1831) 1 Tyrwh. 413; *Feise v. Wray* (1802) 3 East 93.

(81) *Jenkyns v. Usborne* (1844) 7 M. & G. 678.

(82) *Imperial Bank v. London & St. Katharine's Dock Co.* (1877) 5 Ch. D. 195.

(83) *Gunn v. Bolckow* (1875) L.R. 10 Ch. App. 501.

buyer, the unpaid seller of goods, as such, has by implication of law (84):

(a) A lien on the goods or right to retain them for the price while he is in possession of them.

(b) In case of insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c) A right of re-sale as limited by the Act (85).

Where any right would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract (86).

In commercial contracts the presumption is that the contract is made with reference to the usages of trade applicable to the contract, and which the parties making it knew or may be reasonably presumed to have known (87). Evidence of a usage is not admissible to control, vary, or contradict the positive stipulations in a written contract (88); but it may be admitted for the purpose of explaining the terms used in the contract, i.e. to find the mercantile meaning of the words which are used (89).

Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withdrawing delivery similar to and co-extensive with his rights of lien and stoppage

(84) Stat. Man. 1896, c. 25, s. 37 (1); R.S.B.C. 1897, c. 169, s. 50; Con. Ord. N.W.T. c. 39, s. 38.

(85) Stat. Man. 1896, c. 25, s. 45; R.S.B.C. 1897, c. 169, s. 50; Con. Ord. N.W.T. c. 39, s. 46.

(86) Stat. Man. 1896, c. 25, s. 52.

(87) *Hutton v. Warner* (1836) 1 M. & W. 475.

(88) *The Reeside* (1837) 2 Sumner (U.S.) 567, 569, per Story, J.

(89) *Bowes v. Shand* (1877) 2 App. Cas. 468.

in transitu where the property has passed to the buyer (90).

Seller's lien — B.C., N.W.T. and Manitoba. Under the several Acts mentioned, the unpaid seller of goods who is in possession of them has, subject to the provisions of the statute itself, a right to retain possession of the goods until payment or tender of the price in the following cases (91), namely:—

(a) Where the goods have been sold without any stipulation as to credit;

(b) Where the goods have been sold on credit, but the term of credit has expired;

(c) Where the buyer becomes insolvent: and a person is deemed to be insolvent, within the meaning of the Act, who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due (92).

The seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee for the buyer (93). This is in extension of the previous law which allowed the lien in such a case only where the buyer became insolvent (94).

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been

(90) Stat. Man. 1896, c. 25, s. 37 (2); R.S.B.C. 1897, c. 160, s. 50 (2); Con. Ord. N.W.T. c. 39, s. 38 (2).

(91) Stat. Man. 1896, c. 25, s. 38; R.S.B.C. 1897, c. 51; Con. Ord. N.W.T. c. 39, s. 39.

(92) Stat. Man. 1896, c. 25, s. 58 (3); Con. Ord. N.W.T. c. 39, s. 2 (3).

(93) Stat. Man. 1896, c. 25, s. 38 (2); R.S.B.C. 1897, c. 169, s. 51; Con. Ord. N.W.T. c. 39, s. 39 (2).

(94) *Cusack v. Robinson* (1861) 30 L.J. Q.B. 264; *Grice v. Richardson*, (1877) 3 App. Cas. 319.

made under such circumstances as to show an agreement to waive the lien or right of retention (95).

It is also declared that the unpaid seller of goods loses his lien or right of retention thereon (96).

(a) When he delivers the goods to a carrier or other bailee (being the buyer's agent) for the purpose of transmission to the buyer without reserving the right of disposal of the goods. If the carrier who receives possession of the goods be the seller's agent, his possession is the possession of the seller and the lien would remain;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof. Examples of waiver are, selling on credit, *i.e.* where the buyer is to take possession of the goods and the seller is to trust to the buyer's promise for the payment of the price at a future time (97); or by taking a bill, note, or other negotiable security in conditional payment of the price, thereby making the seller a *paid* seller for the time being (98); or by assenting to the buyer's re-selling or pledging the goods (99).

But the lien or right of retention is not lost by reason only that the unpaid seller has obtained judgment or decree for the price of the goods (100); nor

(95) Stat. Man. 1896, c. 25, s. 39; R.S.B.C. 1897, c. 169, s. 52; Con. Ord. N.W.T. c. 39, s. 40.

(96) Stat. Man. 1896, c. 25, s. 40; R.S.B.C. 1897, c. 169, s. 53; Con. Ord. N.W.T. c. 39, s. 41.

(97) *Spartali v. Benecke* (1850) 10 C.B. 212; Benjamin on Sale 1888 ed. 809.

(98) *Miles v. Gorton* (1834) 2 C. & M. 512.

(99) *Stoveld v. Hughes* (1811) 14 East 308; *Merchant Banking Co. v. Phoenix* (1877) 5 Ch. D. 205.

(100) Stat. Man. 1896, c. 25, sec. 40 (2); R.S.B.C. 1897, c. 169, s. 53 (2); Con. Ord. N.W.T. c. 39, s. 41 (2).

was it under the law previous to the Sale of Goods Statutes before mentioned (101).

Subject to the provisions of the Act, the unpaid seller's right of lien or retention is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto (102); provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or retention is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention can only be exercised subject to the rights of the transferee.

The seller's assent to a sale or other disposition may be either express (103), or implied, as by conduct recognizing the title of the subsequent buyer or pledgee (104). A "document of title to goods" means any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented (105); and a thing is deemed to be

(101) *Scrivenor v. G. N. Ry.* (1871) 19 W. R. 388.

(102) Stat. Man. 1896, c. 25, s. 44; R.S.B.C. 1897, c. 169, s. 57; Con. Ord. N.W.T. c. 39, s. 45.

(103) *Stoveld v. Hughes* (1811) 14 East 308.

(104) *Pearson v. Dawson* (1858) E. B. & E. 448.

(105) Stat. Man. 1896, c. 25, s. 58 (1); R.S.B.C. c. 169, s. 2, and c. 4, s. 2; Con. Ord. N.W.T. c. 39, s. 2, and c. 40, s. 2 (4).

done "in good faith" within the meaning of the Act when it is in fact done honestly, whether it be done negligently or not (106).

Re-sale by unpaid vendor—B.C., N.W.T., and Manitoba.—Where an unpaid seller who has exercised his right of lien or retention re-sells the goods, the buyer acquires a good title thereto as against the original buyer (107); and where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not, within a reasonable time, pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract (108). What is a reasonable time is a question of fact (109) and not one of law.

So also, where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract is thereby rescinded, but without prejudice to any claim the seller may have for damages (110); but with those exceptions a contract of sale is not rescinded by the mere exercise by an unpaid vendor of his right of lien or retention (111).

(106) Stat. Man. 1896, c. 25, s. 58 (2); Con. Ord. N.W.T. c. 39, s. 2 (2).

(107) Stat. Man. 1896, c. 25, s. 45 (2); R.S.B.C. 1897, c. 169, s. 58 (2); Con. Ord. N.W.T. c. 39, s. 46 (2).

(108) Stat. Man. 1896, c. 25, s. 45 (3); R.S.B.C. c. 169, s. 58 (3); Con. Ord. N.W.T. c. 39, s. 46 (3).

(109) Stat. Man. 1896, c. 25, s. 53; R.S.B.C. c. 169, s. 66; Con. Ord. N.W.T. c. 39, s. 54.

(110) Stat. Man. 1896, c. 25, s. 45 (4); R.S.B.C. 1897, c. 169, s. 58 (4); Con. Ord. N.W.T. c. 46 (4).

(111) Stat. Man. 1896, c. 25, s. 45 (1); R.S.B.C. 1897, c. 169, s. 58 (1); Con. Ord. N.W.T. c. 39, s. 46 (1).

The express reservation of the right to re-sell, ordinarily reserved in cases of sales by auction, is construed as a condition for making void the sale on the buyer's default, and if the goods are re-sold at a profit the seller is entitled to it; and if at a loss, the buyer is liable for the damages, including the expenses attending the re-sale (112); but if there be no express reservation of the right to re-sell, the goods are sold as being the property of the buyer, and the latter is entitled to the excess if they sell for a higher price than he agreed to give (113).

Revendication and preference — Quebec. — The unpaid vendor of a thing has two privileged rights :

- (1) A right to revendicate;
- (2) A right of preference upon its price (114).

In the case of insolvent traders these rights must be exercised within 30 days after the delivery (115). The right to revendicate is subject to four conditions :

- (1) The sale must not have been made on credit ;
- (2) The thing must still be entire and in the same condition ;

(3) The thing must not have passed into the hands of a third party who has paid for it ;

(4) It must be exercised within eight days after the delivery, saving the provision concerning insolvent traders, already referred to, when 30 days is allowed (116).

In an action to revendicate goods as having been sold for cash to the defendant, an insolvent trader,

(112) *Lamond v. Davall* (1847) 9 Q. B. 1030, 16 L.J.Q.B. 136 ; Benjamin on Sale, 4th ed., p. 803.

(113) *Greaves v. Ashlin* (1813) 3 Camp. 426.

(114) Quebec Civil Code, Art. 1998.

(115) 54 Vict. 1890 (Que.) c. 39, s. 2.

(116) Civil Code Que. Art. 1999.

within thirty days prior to the seizure, a third party who establishes that he purchased the said goods from defendant and received a delivery order therefor, and settled for the same by note, is entitled to intervene and contest the demand in revendication, just as the defendant himself might have done, and to have it set aside on the ground that the sale from plaintiff to defendant was not for cash, but was made on credit (117).

If the thing be sold pending the proceedings in revendication, or if, when the thing is seized at the suit of a third party, the vendor be within the delay and the thing in the conditions prescribed for revendication, the vendor has a privilege upon the proceeds in preference to other privileged creditors. If the thing be still in the same condition, but the vendor be no longer within the delay or have given credit, he has a like privilege upon the proceeds, except as regards the lessor, or the pledgee (118).

Ontario — Warehouse receipts for merchandise, etc.—Under the Ontario Mercantile Amendment Act (119), any cove receipt, bill of lading, specification of timber, or any receipt given by a cove keeper, miller, or by the keeper of a warehouse, wharf, yard, harbour or other place, for cereal grains, goods, wares or merchandise (including timber, boards, deals, staves and other lumber) laid up, stored or deposited, or to be laid up, stored or deposited in or on the cove, mill, warehouse, wharf, yard, harbour or other place in Ontario, of which he is keeper, or any bill of lading or receipt given by a master of a vessel, or by a carrier for carrying cereal grains, goods, wares or merchandise

(117) *Gillespie v. Doherty* (1898) 12 Que. S.C. 536.

(118) Civil Code Que. Art. 2000.

(119) R.S.O. 1897, c. 145.

shipped in such vessel or delivered to such carrier for carriage from any place whatever, to any part of Ontario, or through the same, or on the waters bordering thereon, or from the same to any other place whatever, and whether such cereal grains are to be delivered upon such receipt in specie or converted into flour, may, by endorsement thereon by the owner of, or person entitled to receive such cereal grains, goods, wares or merchandise, or his attorney or agent, be transferred to any private person as collateral security for any debt due to such private person, and being so endorsed shall vest in such private person from the date of the endorsement, all the right and title of the endorser to or in such cereal grains, goods, wares or merchandise, subject to the right of the endorser to have the same re-transferred to him, if the debt is paid when due; and in the event of the non-payment of the debt when due, such private person may sell the said cereal grains, goods, wares or merchandise, and retain the proceeds or so much thereof as will be equal to the amount due to the private person upon the debt, with any interest or costs, returning the overplus, if any, to the endorser (120).

Where a person engaged in the calling of cove-keeper, miller, or of keeper of any warehouse, wharf, yard, harbour or other place, master of a vessel or carrier, by whom a receipt or bill of lading may be given in such his capacity, as hereinbefore mentioned, for cereal grains, goods, wares or merchandise, is at the same time the owner of or entitled himself (otherwise than in his capacity of cove-keeper, miller, or of keeper of a warehouse, wharf, yard, harbour or other place, or of master of a vessel or carrier) to receive such cereal grains, goods, wares or merchandise, any such receipt or bill of lading, or any acknowledgement

(120) Secs. 6 and 7.

or certificate intended to answer the purpose of such receipt or bill of lading, given and endorsed by such person, shall be as valid and effectual for the purposes of this Act, as if the person giving such receipt or bill of lading acknowledgment or certificate, and endorsing the same, were not one and the same person (121).

This latter provision, however, only extends to cases in which the person issuing the warehouse receipt is, from the nature of his calling, a custodian of goods for others as well as for himself (122). No transfer of any such bill of lading, specification of timber, or receipt, may be made under the 'Mercantile Amendment Act,' to secure the payment of any debt unless the debt is contracted at the *same time* with the endorsement of the bill of lading, specification of timber, or receipt (123).

The statute further declares that all advances made on the security of any such cove receipt, bill of lading, specification, receipt, acknowledgment or certificate as aforesaid, shall give and be held to give to the person making the advances, a claim for the repayment of such advances on the cereal grain, goods, wares or merchandise therein mentioned, prior to and by *preference over the claim of any unpaid vendor*, or other creditor, save and except claims for wages of labour performed in making and transporting such timber, boards, deals, staves or other lumber (124).

(121) R.S.O. 1897, c. 145, s. 8.

(122) *Tennant v. Union Bank* (1894) App. Cas. 31.

(123) R.S.O. 1897, c. 145, s. 9 and 10.

(124) R.S.O. 1897, c. 145, s. 11.

CHAPTER VIII.

STOPPAGE IN TRANSITU.

Stoppage in transitu defined. If goods are consigned on credit by one merchant to another and the consignee becomes insolvent, the seller has the right to retake possession of the goods while still on their way to the consignee, although the property therein has passed to the consignee and although the latter has the constructive possession of them (1). That privilege is called the right of stoppage in transitu. The right is based upon principles of equity and the doctrine has always been construed favourably to the unpaid seller (2). The effect of the vendor's exercising the right is not to rescind the contract (3), but to restore the goods to the vendor's possession so that he may insist on his lien for the price (4). The effect is the same as if the consignor had not delivered them to the carrier (5).

The right is operative only as against the goods in the condition they are in at the time of its exercise, and does not apply as against insurance moneys payable on account of the goods being damaged or lost in the transit (6).

(1) *Kendall v. Marshall* 11 Q.B.D. 356, 364.

(2) *Bethell v. Clark* 20 Q.B.D. 617; *Schotsmans v. Lancashire*, L.R. 2 Ch. 332.

(3) *Brassert v. McEwen* 10 Ont. R. 179; *Phelps v. Comber* 29 Ch. D. 813.

(4) *Wentworth v. Outhwaite* 10 M. & W. 436; *Schotsmans v. Lancashire*, L.R. 2 Ch. 332; *Phelps v. Comber* 29 Ch. D. 813.

(5) *Edwards v. Brewer* 2 M. & W. 375.

(6) *Berndston v. Strang*, L.R. 3 Ch. 588.

Dependent upon insolvency. The insolvency which will authorize the right of stoppage in transitu need not be technical insolvency, but it is sufficient if there is a general inability to pay debts, of which the failure to pay one just and admitted debt would probably be sufficient evidence (7). The insolvency need not have been judicially declared and it is sufficient if there be a general inability to pay, evidenced by stoppage of payment (8). The vendor has the right to judge for himself of the danger of the vendee's insolvency, and to take measures to guard against it (9); and it does not matter that the insolvency is not known or declared at the time of the stoppage provided the vendee becomes actually insolvent before he obtains possession of the goods (10).

The transit.—When the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right to stop them and to resume possession of them as long as they are in course of transit, and may retain them until payment or tender of the price. This right may be exercised although the carrier holds the goods as the purchaser's agent, if the stoppage takes place before the destination is reached (11).

Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the

(7) *Couture v. McKay* (1889) 6 Man. R. 273; *Bird v. Brown* 4 Ex. 786.

(8) *Vertue v. Jewell* 4 Camp. 31; *Newsom v. Thornton* 6 East, 17.

(9) *Patten v. Thompson* 5 M & S. 350.

(10) *Gardner v. Tudor* 8 Pick. (Mass.) 205.

(11) *Lyons v. Hoffnung* (1890) 15 App. Cas. 391; *Lickbarrow v. Mason* 2 T.R. 63.

purpose of transmission to the buyer, until the buyer or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier. If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. If, after the arrival of the goods at the appointed destination the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer. It can only be said that goods are sent to their 'destination' when they are sent to the purchaser, or to the person to whom he directs them to be sent—to a particular person at a particular place. That is the meaning of 'destination' in a business sense. In business 'destination' means that there must be given not only the name of the place to which, but also the name of the person to whom, goods are to be sent (12).

Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water or land, and although such carrier may have been named and appointed by the consignee, but also when they are in any place of deposit, connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purpose of transmission and delivery, until they arrive at the actual possession of the consignee, or at the possession of his agent, who is to hold them at his disposal and to deal with them accordingly (13).

If the vendee take them out of the possession of the carrier into his own before their arrival, with or

(12) *Ex parte Miles* (1885) 15 Q.B.D. 39, 44.

(13) *Kendall v. Marshall* (1883) 11 Q.B.D. 356.

without the consent of the carrier, there seems to be no doubt that the transit would be at an end, though in the case of the absence of the carrier's consent it may be a wrong to him for which he would have a right of action (14).

The arrival which is to divest the vendor's right of stoppage in transitu must be such that the buyer has taken actual or constructive possession of the goods, and that cannot be so long as he repudiates them (15).

And if the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back. When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer (16). The delivery in the purchaser's own ship is, however, a final delivery at the place of destination (17).

Where goods are sold and by the terms of the bargain they are to be sent to a particular designation, the *transitus* is not at an end until the goods have reached the place named (17a); but with this exception, that if the vendee gets the goods from the carrier before they arrive at such place, the transit is at an end. The real test is not what is said but what is done (18). The consignee may require the goods to be delivered

(14) *Whitehead v. Anderson* (1842) 9 M. & W. 518.

(15) *Bolton v. Lancashire Ry.* (1866) L. R. 1 C. P. 431.

(16) *VanCasteel v. Booker* (1848) 2 Ex. 691.

(17) *Schotsmans v. Lancashire Co.* (1867) L. R. 2 Ch. 332.

(17a) *Coates v. Railton* 6 B. & C. 422; *Kendall v. Marshall* 11 Q. B. D. 356.

(18) *Kendall v. Marshall* 11 Q. B. D. 356, 360.

to him at any stage of the journey (19). And although the goods may not have reached their ultimate destination, yet if they have so far got to the end of their journey that they await new orders from the purchaser to move them, and without such orders they would remain where they are, the *transitus* is ended (20). Where part of the goods sold by one entire contract is taken possession of by the vendee, without any intention on the vendor's part of retaining the rest, but as a step towards and in progress of the delivery of the whole, such is the taking possession of the whole (21).

So long as the goods remain in the possession of the carrier as such, even though the carrier may have been appointed by the consignee himself, they are to be deemed in *transitu* until they come into the actual or constructive possession of the consignee (22). Wherever it is part of the bargain between the vendor and the vendee that the transit shall last up to a certain time, the transit continues until that time has arrived (23); but if goods are bought to be afterwards despatched as the vendee may direct, and it is not part of the bargain that the goods shall be sent to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination (24).

(19) *London & N.W.Ry. v. Bartlett* 7 H. & N. 400; *Fraser v. Will* L.R. 7 Eq. 64.

(20) *Dixon v. Baldwin* 5 East, 186; *Ex. p. Miles* 15 Q.B.D. 44; *Bethell v. Clark* 20 Q.B.D. 619; *Lyons v. Hoffnung* 15 App. Cas. 391.

(21) *Hammond v. Anderson* 1 B. & P. N.R. 69; *Ex. p. Cooper* 11 Ch. D. 68.

(22) *Ex. p. Rosevear* 11 Ch. D. 560; *Ex. p. Barrow* 6 Ch. D. 783.

(23) *Ex. p. Watson* 5 Ch. D. 35.

(24) *Kendal v. Marshall* 11 Q.B.D. 356, 369, per Bowen, L.J.

A seizure under an attachment commencing an action, or before judgment recovered, does not prevent the exercise of the right (25); but if goods in transit are seized by a sheriff under an execution upon a judgment recovered and are removed from the custody of the carrier, the *transitus* is at an end and the consignor cannot after such removal exercise the right (26). The right is equally defeated whether the vendee obtains possession of the goods at the termination of the *transitus* as originally intended, or at some intermediate point; and whether the possession of the goods be obtained by the vendee himself, or by his agent who obtains them for the purpose of holding them, or by an assignee in bankruptcy, or a sheriff deriving his authority from the court to take the goods of the vendee (27).

When goods are placed in the warehouse of a third party who has been in the habit of receiving goods for the purchaser and holding them as his agent until he takes them away, the transit is at an end, although the warehouseman does not charge any rent (28).

Where bill of lading assigned. If the consignee named in the bill of lading should become insolvent, without having paid for the goods, yet his unconditional transfer of the goods and the bill of lading, if made for a valuable consideration and without the assignee having received notice that the goods were not paid for and that the consignee was insolvent, or that the goods were paid for by bills sure to be dis-

(25) *McLean v. Breithaupt* 12 Ont. App. 383; *Durgy Cement Co. v. O'Brien* 123 Mass. 12; *Buckley v. Furness* 15 Wend. (N.Y.) 137.

(26) *Couture v. McKay* (1889) 6 Man. Rep. 273.

(27) *Couture v. McKay* (1889) 6 Man. R. 273; Blackburn on Sale 397.

(28) *Wiley v. Smith* 1 Ont. App. 179, 195; 2 Can. S.C.R. 1.

honoured, will pass the goods absolutely to the assignee, and deprive the consignor of the right of stoppage in *transitu* which, as against the original consignee, he might have exercised (29). But mere knowledge by the endorsee that the goods have not been paid for does not defeat his rights; to effect that result the knowledge must be of such circumstances as render the bill of lading not fairly and honestly assignable (30). Where the bill of lading has been transferred by way of pledge only, a qualified right of stoppage remains, and, on the claim of the pledgee being discharged, the right is exactly the same as if there had been no security as against the original purchaser and those claiming under him (31); and, in equity, the vendor may, by giving notice to the pledgee during the transit, resume, subject to the pledgee's claim, his former interest in the goods and will after such notice be entitled to the residue of the proceeds after the pledgee's demand has been satisfied (32). The right of stoppage in transitu cannot, however, be exercised as against the purchase money payable by a sub-purchaser to his vendor, as the right is, in its nature, one which is applicable only to the goods (32a).

A pre-existing debt is a valuable consideration which will support a transfer of a bill of lading as against a right of stoppage (33).

(29) *Lickbarrow v. Mason* 2 T.R. 63, 5 T.R. 683; *Gurney v. Behrend* 3 E. & B. 622; *The Marie Joseph* L.R. 1 P.C. 219.

(30) *Cuming v. Brown* 9 East 506; *Salomons v. Nissen* 2 T.R. 674.

(31) *Kemp v. Falk* 7 App. Cas. 577, per Selborne L.C.

(32) *Re Westzinthus* 5 B. & Ad. 817; *Berndtson v. Strang* L.R. 3 Ch. 588; *Rodger v. Comptoir d'Escompte de Paris* L.R. 2 P.C. 393; *Kemp v. Falk* 7 App. Cas. 573.

(32a) *Kemp v. Falk* 7 App. Cas. 573, 583; *Contra, Ex. p. Golding* 13 Ch. D. 628.

(33) *Clementson v. Grand Trunk Ry.* 42 U.C.R. 263; *Leask v. Scott* 2 Q.B.D. 376.

Goods in bond. When the Collector of Customs receives the bond of the vendee, there is as complete a delivery as if the goods had been delivered into his own hands. The collector has a lien on the goods, and would be justified in detaining them until it is satisfied; but as between vendor and vendee the goods are at home and constructively in the possession of the purchaser, the customs authorities (subject to the payment of the duties) having by the acceptance of the bond undertaken to hold them for the use of the purchaser, and subject to such sales or dispositions as he might choose to make (34).

Merchants in New York sold to E. B. & Co. at Toronto 250 barrels of currants on credit, and consigned the same to him in bond. A bill of lading thereof was duly received by E. B. & Co., who paid the freight and accepted a draft for the price as well as for the cartage and other charges. The goods on arrival were entered and bonded in the consignees' name and placed in a customs bonded warehouse subject to the payment of the duties. E. B. & Co. sold and delivered a part of same and had the remainder removed in bond to a portion of their own warehouse partitioned off and used as a customs warehouse for their own goods. E. B. & Co. became insolvent before the maturity of the draft, and it was held that their vendors had lost the right to stop the goods, the transitus being at an end (35).

Merchants in Boston shipped a quantity of oil to merchants in Halifax; between the shipment of the oil and its arrival at Halifax the buyers became insolvent.

(34) *Wiley v. Smith* 1 Ont. App. 179, affirmed 2 Can. S.C.R. 1; *Wilds v. Smith* 2 Ont. App. 8.

(35) *Wiley v. Smith* 2 Can. S.C.R. 1, affirming 1 Ont. App. 179; *Howell v. Alport* 12 U.C.C.P. 375 and *Graham v. Smith* 27 U.C.C.P. 1 overruled.

but before making an assignment for creditors, and without any intention of accepting or taking delivery of the oil or exercising any control over it on their own account, the buyers by a custom-house order made before the goods were discharged transferred the oil, together with the bill of lading, to one G. to be held for and on account of the shippers. It was held that the exercise of the right of stoppage by G., acting for the sellers, was in time and that the transitus had not been completed (36).

H., of Souris, P.E.I., carried on the business of lobster packing, sending his goods to M., of Halifax, N.S., who supplied him with tin plates, etc. They had dealt in this way for several years, when, in 1882, H. shipped 180 cases of beef via Pictou and the Intercolonial Railway of Canada addressed to M. The bill of lading for this shipment was sent to M. and provided that the goods were to be delivered at Pictou, to the freight agent of the I.C.R. or his assigns, the freight to be payable in Halifax. M., the consignee, being on the verge of insolvency, indorsed the bill of lading to McM. to secure accommodation acceptances. H. drew on M. for the value of the consignment, but the draft was not accepted, and H. then directed the agent of the I.C.R. not to deliver the goods. The goods had been forwarded from Pictou, and the agent there telegraphed to the agent at Halifax to hold them. McM. applied to the agent at Halifax to deliver the goods and tendered the freight, but delivery was refused. In a replevin suit against the Halifax agent it was held, affirming the judgment of the court below (Henry, J., dissenting), that the goods were sent to the agent at Pictou to be forwarded, and that he had no other interest in them, or right or duty connected with them,

(36) *Richardson v. Twining* 2 N.S. D. 281.

than to forward them to their destination, and could not authorize the agent at Halifax to retain them; and that whether or not a legal title to the goods passed to McM., the position of the agent in retaining the goods was simply that of a wrongdoer, and McM. had such an equitable interest in such goods, and right to the possession thereof, as would prevent the agent from withholding them (37).

Where it was part of the terms of sale of a quantity of whiskey that the seller should, from time to time as the buyer should direct, ship to him portions thereof, and pay the storage charges, taxes and insurance, and draw on the buyer for the amounts, and the buyer became insolvent while a shipment was in transit, it was held that the right of stoppage was not lost although the vendor had before forwarding the whiskey obtained a warehouse certificate for it in the name of the purchaser and had forwarded such certificate to the purchaser (38).

It is in such a case no answer to the vendor's claim to say that there was a constructive delivery of the whiskey to the buyer by virtue of the delivery of the warehouse receipt to him, and that he had the right to take possession of it and withdraw it from the warehouse; for the purchaser did not take possession of it at the warehouse, but left it in charge of the seller to be shipped by him (39).

Parties entitled to the right.—The right can be exercised only by a person who holds the relation of vendor to the consignee (40). And a commission agent or factor who has paid for goods purchased for

(37) *McDonald v. McPherson* 12 Can. S.C.R. 416.

(38) *Mohr v. Boston & Albany Ry.* 106 Mass. 67.

(39) *Ibid.*

(40) *Feise v. Wray* 3 East, 93; *Ireland v. Livingston*, L.R. 5 H.L. 395.

his principal, or who has rendered himself liable to pay the purchase money, is substantially in the position of a vendor and may stop the goods in transitu in like manner as a vendor (41). So where a broker purchased for an undisclosed principal he was held entitled to the right (42); and a foreign purchasing agent who buys goods on his own credit from a person unknown to the principal and charges a commission on the price is a consignor and is entitled to stop the goods in transitu if the principal fails while they are on their way (43).

The vendor may exercise the right even when the goods are consigned to be sold on the joint account of himself and the consignee (44); but a mere surety is not entitled (45).

If the stoppage in transitu be made by an unauthorized person on behalf of the seller, the act must be ratified before the transit is over, otherwise it will not be effectual (46). The authority of an agent of the vendor to exercise the right need not be specific as to the particular transaction (47); and it will be sufficient if he acted within the general scope of his authority.

Under what conditions.—It is not necessary for the vendor to tender back the purchaser's note or accep-

(41) *Oakford v. Drake* 2 F. & F. 493.

(42) *Imperial Bank v. London & St. Katharine's Dock Co.* 5 Ch. D. 195.

(43) *The Tigress* 32 L. J. Adm. 97; *Feise v. Wray* 3 East, 93.

(44) *Newson v. Thornton* 6 East, 17.

(45) *Siffken v. Wray* (1805) 6 East, 371.

(46) *Bird v. Brown* 4 Ex. 786.

(47) *Hutchings v. Nunes* 1 Moo. P.C. 243.

tance before exercising the right, for, though the bills may be proved in bankruptcy against the estate of the purchaser, and part payment obtained, a part payment does not deprive the vendor of the right to stop in transitu (48).

But if the goods are paid for by the note or acceptance of a *third person* without the indorsement or guaranty of the purchaser, the note is regarded as absolute payment and there is no right of stoppage (49). Unless the goods are stopped by the seller, the buyer or his assignee may take possession of them, and put an end to the transit and to the vendor's right of stoppage (50).

But if goods be sent to a commission merchant to be disposed of, and he becomes insolvent, and the goods remain distinguishable from the general mass of his property, the principal may recover the goods in specie, and is not driven to the necessity of proving his debt in the insolvency proceedings; and if the goods have been sold and the proceeds are ear-marked, he may recover them (51).

The validity of a stoppage in transitu depends upon the following conditions (52):—

- (a) The vendor must be unpaid;
- (b) The vendee must be insolvent;
- (c) The vendee must not have endorsed the bill of lading over for value.

But no proof that these conditions have been fulfilled is required from the vendor before exercising the right of stoppage (53). Whether the vendor is or

(48) *Feise v. Wray* 3 East, 93; *McEwan v. Smith* 2 H.L.C. 309.

(49) *Eaton v. Cook* 32 Vt. 58.

(50) *Ellis v. Hunt* 3 T.R. 464, 467.

(51) *Tooke v. Hollingworth* 5 T.R. 215.

(52) *The Tigris* 32 L.J. Adm. 97.

(53) *Gurney v. Behrend* 3 E. & B. 622.

is not unpaid may depend upon the balance of a current account; whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange for the goods becomes due; and whether the vendee has or has not indorsed the bill of lading over, is a matter not within the cognizance of the vendor. He exercises his right of stoppage in transitu at his own peril, and it is incumbent upon the ship-master to give effect to the claim as soon as he is satisfied it is made by the vendor, unless he is aware of a legal defeasance of the vendor's claim (54).

The vendors' right of stoppage in transitu is subject to the carriers' lien for the freight; and, if the goods be consigned to one person under one contract, the carrier has a lien upon the whole for freight and charges on every part; and a delivery of a part of the goods does not discharge his lien upon the rest without proof of an intention so to do, even as against the right of the consignor to stop in transitu the goods not delivered, but the carrier may charge against those goods the freight on the whole consignment (55).

Whether or not there was a right of stoppage in transitu, it is competent for the parties, if the goods have not been actually accepted and have, therefore, not passed as regards the property therein, to rescind the contract of sale and allow the vendor to re-take possession even as against an assignee in insolvency (56).

Notice to carrier to stop the goods.—Although a notice to stop goods in transitu which are in bond at a customs warehouse belonging to the railway company at a railway depot may be valid if given to the

(54) *The Tigris* 32 L.J. Adm. 97, 101, per Dr. Lushington.

(55) *Potts v. N.Y. & N.E. Ry.* 131 Mass. 455.

(56) *Mason v. Redpath* 39 U.C.R. 157.

railway company alone, it is advisable to give notice also to the customs officer (57).

A notice of stoppage must give such particulars as are necessary for the carriers to identify the packages it is intended to affect, if they have other goods addressed to the same consignee and, therefore, cannot distinguish them (58).

Notice given to the carrier's agent, who has the actual custody of the goods in the regular course of his agency, is good notice to the carrier (59).

If notice to stop the goods be served on a shipowner he is under an obligation to send it on with reasonable diligence to the master of the ship, and if the notice arrives before the goods are delivered to the consignee, there is a valid stoppage in transitu; but if notwithstanding the use of reasonable diligence by the shipowner, the goods were delivered before the notice reached the master, the shipowner would not be responsible (60).

If the notice be given to the principal when the goods are in the custody of his agent or servant, the notice will not be effectual unless it be given at such a time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to such agent or servant in time to prevent the delivery of the goods to the consignee; and the only duty that the law imposes on the absent principal is to use reasonable diligence to prevent the delivery (61).

The right of stoppage in transitu extends not only to countermand delivery to the vendee, but to require

(57) *Ascher v. G. T.R.* 36 U.C.R. 609, 614.

(58) *Clementson v. G. T.R.* 42 U.C.R. 263.

(59) *Jones v. Earl* 37 Cal. 630, 99 Am. Dec. 338.

(60) *Kemp v. Falk* 7 App. Cas. 573, 585.

(61) *Whitehead v. Anderson* 9 M. & W. 518, per Parke, B.

re-delivery to the vendor, and the latter may at once demand the goods (62).

Wrongful refusal of carrier to deliver.—Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end (63).

Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods (64).

Re-sale of stopped goods.—Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of stoppage in transitu is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the right of stoppage in transitu can only be exercised subject to the rights of the transferee; but in other respects the right of stoppage is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto (65).

The contract is not ordinarily rescinded by the mere exercise of the right of stoppage, but if the

(62) *The Tigris* 32 L.J. Adm. 97.

(63) *Bird v. Brown* (1850) 4 Ex. 786.

(64) *Ex parte Cooper* (1879) 11 Ch. D. 68; *Jones v. Jones* (1841) 8 M. & W. 431.

(65) *Dixon v. Yates* 5 B. & Ad. 313.

stoppage is justifiable and the party exercising it re-sells the goods, the second buyer acquires a good title as against the original buyer (66).

If, however, the seller has by his contract of sale expressly reserved a right of re-sale in case the buyer should make default, the sale is then a conditional one, and on its non-fulfilment the defaulter, in case of a re-sale, is liable for the difference and expenses (67).

Perishable goods are particularly subject to an alteration in price in a few days or a few hours, and the law follows the usage of trade in sanctioning a re-sale of such goods by the unpaid seller exercising the right of stoppage, and this without any notice to the buyer (68).

Where the buyer is bankrupt, and his trustee does not tender the price of the goods to the seller who is in possession of them within a reasonable time, the seller may treat the contract as rescinded without tendering the goods to the trustee, and may prove in the bankruptcy for damages (69).

Waiver.—The fact that the vendee has given his note or acceptance for the price of the goods does not defeat the vendor's right of stoppage in transitu (70); even although the vendor has negotiated it (71). If the original vendor has notice of the re-sale of the goods by his vendee and at the latter's request consigns them to the sub-purchaser his right of stoppage is

(66) *Lord v. Price* (1874) L.R. 9 Ex. 54.

(67) *Lamond v. Devalle* (1847) 9 Q.B. 1030.

(68) *Maclean v. Dunn* 4 Bing. 722.

(69) *Ex parte Stapleton* (1879) 10 Ch. D. 586.

(70) *Lewis v. Mason* 36 U.C.R. 590.

(71) *Miles v. Gorton* 2 Crompt. & M. 504.

waived (72). Proving a claim for the price of the goods against the estate of the consignee will not deprive the vendors from stopping them in transitu (73).

The right of stoppage in transitu will be lost if part delivery of the goods has been made under such circumstances as show an agreement to give up possession of the whole of them. There may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as a delivery of the whole (74); if both parties intended it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole (75).

British Columbia, N.W. Territories and Manitoba.

Under the respective statutes relating to the Sale of Goods in force in the Provinces of British Columbia and Manitoba and in the North-West Territories (76), the law relating to stoppage in transitu has been codified, following closely the form of the Imperial Sale of Goods Act of 1893 (77). Under these statutes it is declared that subject to any provisions of the same, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to

(72) *Eaton v. Cook* 32 Vt. 58.

(73) *Morgan Envelope Co. v. Boustead* 7 Ont. R. 697.

(74) Benjamin on Sales, 4th ed. p. 813.

(75) *Kemp v. Falk* (1882) L.R. 7 App. Cas. 586.

(76) R.S.B.C. 1897, c. 169; Stat. Man. 1896, c. 25; Con. Ord. N.W.T. 1898, c. 39.

(77) 56 & 57 Vict. (Imp.) c. 71.

say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price (78).

Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee (79).

If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end (80).

If after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer (81).

If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back (82). An insolvent buyer may thus refuse to take possession of the goods, and so prolong the transit, and his conduct

(78) Stat. Man. 1896, c. 25, s. 41; R.S.B.C. c. 169, s. 54; Con. Ord. N.W.T. c. 39, s. 42.

(79) Stat. Man. 1896, c. 25, s. 42 (1); R.S.B.C. 1897, c. 169, s. 55; Con. Ord. N.W.T. c. 39, s. 43 (1).

(80) Stat. Man. 1896, c. 25, s. 42 (2); R.S.B.C. 1897, c. 169, s. 55 (2); Con. Ord. N.W.T. c. 39, s. 43 (2).

(81) Stat. Man. 1896, c. 25, s. 42 (3); R.S.B.C. 1897, c. 169, s. 55 (3); Con. Ord. N.W.T. c. 39, s. 43 (3).

(82) Stat. Man. 1896, c. 25, s. 42 (4); R.S.B.C. 1897, c. 169, s. 55 (4); Con. Ord. N.W.T. c. 39, s. 43 (4).

does not amount to a fraudulent preference in favour of the seller (83).

When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in possession of the master as a carrier, or as agent to the buyer (84).

Where the carrier or other bailee, wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end (85). So where the goods had reached their destination and the consignee had tendered the freight and demanded the goods, and would have taken possession of them but for the wrongful delivery of them to other parties, the transit was held to be terminated (86).

Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods (87).

The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods, or to his principal.

(83) Benjamin on Sales 4th ed. 487; Ker & Pearson-Gee's Sale of Goods Act 248.

(84) Stat. Man. 1896, c. 25, s. 42 (5); R.S.B.C. 1897, c. 169, s. 55 (5); Con. Ord. N.W.T. c. 39, s. 43 (5).

(85) Stat. Man. 1896, c. 25, s. 42 (6); R.S.B.C. 1897, c. 169, s. 55 (6); Con. Ord. N.W.T. c. 39, s. 43 (6).

(86) *Bird v. Brown* (1850) 4 Exch. 786.

(87) Stat. Man. 1896, c. 25, s. 42 (7); Con. Ord. N.W.T. c. 39, s. 43 (7); R.S.B.C. c. 169, s. 55 (7).

In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer (88).

When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller, and the expenses of such re-delivery must be borne by the seller (89).

But a notice given by the seller to hold the proceeds of the sale of the goods subject to his order, is not an effectual stoppage, because the seller expresses no intention of re-taking possession of the goods (90).

The unpaid seller's right of stoppage in transitu is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto; provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale the unpaid seller's right of stoppage in transitu is defeated; and if such last mentioned transfer was by way of pledge or disposition for value, the right of stoppage in transitu can only be exercised subject to the rights of the transferee (91).

The facts in a recent English case were that one

(88) Stat. Man. 1896, c. 25, s. 43 (1); R.S.B.C. 1897, c. 169, s. 56 (1); Con. Ord. N.W.T. c. 39, s. 44.

(89) Stat. Man. 1896, c. 25, s. 43 (2); R.S.B.C. 1897, c. 169, s. 56 (2); Con. Ord. N.W.T. c. 39, s. 44 (2).

(90) *Phelps v. Comber* (1885) 29 Ch. D. 822.

(91) Stat. Man. 1896, c. 25, s. 44; R.S.B.C. 1897, c. 169, s. 57; Con. Ord. N.W.T. c. 39, s. 45.

Steinman had consigned the goods in question to one Pintscher, to whom Steinman sent the bill of lading, accompanied by a bill of exchange for the price. Pintscher refused to accept the bill of exchange, but kept the bill of lading, and in fraud of Steinman sold the goods to the plaintiffs, and indorsed the bill of lading to them, and they paid him the price. Steinman thereupon stopped the goods in transitu, and the action was brought to recover the goods by virtue of the title conferred on the plaintiffs as bona fide indorseees of the bill of lading. The Court of Appeal held that, as the plaintiffs had taken the bill of lading in good faith without notice of the rights of Steinman, from a person who held possession of it with the consent of Steinman, they had acquired a good title, and that Steinman was not as against them entitled to stop the goods in transitu (91a.)

Re-sale by unpaid vendor—B.C., N.W.T., and Manitoba. If the unpaid seller, who has exercised his right of stoppage in transitu, re-sells the goods, the buyer acquires a good title thereto as against the original buyer (92). But the exercise of the right must be lawful and must be justified by reason of the buyer's insolvency (93).

Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods, and recover from the original buyer damages for any loss occasioned by his

(91a) *Cahn v. Pocketts Co.* (1899) 1 Q.B. 643.

(92) Stat. Man. 1896, c. 25, s. 45 (2); R.S.B.C. 1897, c. 169, s. 58 (2); Con. Ord. N.W.T. c. 39, s. 46 (2).

(93) Ker & Pearson-Gee's Sale of Goods Act, 266.

breach of contract (94); and where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages (95). Subject, however, to the provisions just stated a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of stoppage in transitu (96).

Ontario—Transfer of bills of lading. By the Mercantile Amendment Act of Ontario (97) it is enacted that every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of action, and be subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made to himself; but express provision is made that this shall not prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement (98).

(94) Stat. Man. 1896, c. 25, s. 45 (3); R.S.B.C. 1897, c. 169, s. 58 (3); Con. Ord. N.W.T. c. 39, s. 46 (3).

(95) Stat. Man. 1896, c. 25, s. 45 (4); R.S.B.C. 1897, c. 169, s. 58 (4); Con. Ord. N.W.T. c. 39, s. 46 (4).

(96) Stat. Man. 1896, c. 25, s. 45 (1); R.S.B.C. 1897, c. 169, s. 58 (1); Con. Ord. N.W.T. c. 39, s. 46 (1).

(97) R.S.O. 1897, c. 145.

(98) Sec. 5.

Nova Scotia—Transfer of document of title.—By statute in Nova Scotia (99) where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, such transfer has the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu (100); and the expression 'document of title' is declared to include any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented (101); the transfer of a 'document of title' may be by endorsement; or, where the document is by custom or by its express terms transferable by delivery or makes the goods deliverable to the bearer, then by delivery (102).

(99) The Factors' Act, N.S. Laws, 1895, c. 11.

(100) N.S. Laws 1895, c. 11, s. 10.

(101) Sec. 1 (4).

(102) Sec. 11.

CHAPTER IX.

FACTOR'S LIENS.

Factor has a general lien.—A factor or commission merchant has a general lien, dependent on possession, for all that is due him as such, upon all articles of commercial value that are entrusted to him by the same principal. The lien is a general one covering the balance of account due him from his principal because he is an agent for a continuous service. It attaches only to goods received by him in his capacity of factor and not to goods received under a special agreement for a particular purpose. It arises upon an implied agreement, and will be superseded by an express stipulation inconsistent therewith (1).

The lien of factors is one which is allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; but debts which are incurred prior to the existence of the relation of principal and factor are not contracted upon the general principle upon which the lien is allowed, and there is no general lien in respect of such debts (2). It applies only where the debt is one contracted in the factor's business, and is usually limited to advances, expenses, and commissions incurred in the business. Where the principal consigns goods to his agents to sell, under an agreement that he should be permitted to make drafts on them which were to be accepted for his accommodation, the inference is that the drafts were drawn on the credit of the

(1) *Walker v. Birch* 6 T.R. 258, 262.

(2) *Houghton v. Matthews* 3 B. & P. 485, 488; *Mann v. Forrester* 4 Camp. 60.

goods, and that the goods were to be held as an indemnity against the drafts (3); but if goods are left by the principal with his agent for safe keeping only, and not for sale, the agent has no general lien on them for the balance due him from the principal (4).

If the factor effects an insurance for the benefit of the consignor on the goods on which advances have been made, the insurance money which the factor receives in the event of a loss will be substituted for the goods and be subject to the same lien (5).

Judicial notice is taken of the factor's right to a general lien (6).

Actual possession necessary. A factor has no lien on goods consigned to him until they actually come into his possession (7).

Exclusive possession of the chattels is indispensable to the existence of the lien, and a contract for the storage or forwarding of goods under which the consignor reserves the right to order at pleasure the reshipment of goods stored thereunder, and by which each party reserves the right to draw at sight on the other for any balance in his favour, does not create a lien in favour of the consignee for his charges under the contract (8).

To maintain the lien the factor's possession must be lawful (9), and if he has taken possession of the

(3) *Nagle v. McFeeters* 97 N.Y. 196; *Hammond v. Barclay* 2 East 227.

(4) *Burn v. Brown* 2 Stark. 272.

(5) *Johnson v. Campbell* 120 Mass. 449.

(6) *Barnett v. Brandao* 6 M. & G. 630, 665.

(7) *Clark v. Great Western Ry.* 8 U.C.C.P. 191.

(8) *Moline M. & S. Co. v. Walter A. Wood Mowing & R. Mach. Co.* (Neb.) 69 N.W. Rep. 405.

(9) *Kinloch v. Craig* 3 T.R. 119.

goods without the authority of the principal he acquires no lien thereon (10).

Notice of ownership of third party. If the consignor has informed the factor when forwarding the goods that they belonged to another person and directed that the proceeds be credited to such person, no general lien will exist in favour of the factor (11). And if the agent has notice of the bankruptcy of his principal, or of his assignment for the benefit of his creditors, before he gets possession of the property, or before he receives a bill of lading or other document of title thereto, he cannot hold it under a claim of a general lien (12).

Rights of factor's assignee for creditors.—If a factor makes a general assignment for the benefit of his creditors, the assignee has no right to sell the goods, for the factor cannot delegate his authority to another without the consent of the principal (13). The lien on the goods passes to the assignee but his legal right extends no further than to hold the goods by virtue of the lien; a sale of them without the principal's authority would be a tortious conversion (14).

Control of consignor.—The lien attaches not only upon the goods while the factor holds them but upon the proceeds after he has sold them (15); but he may not sell against his principal's consent in order to

(10) *McKean v. Wagenblast* 2 Grant's Cas. (Pa.) 462.

(11) *Weymouth v. Boyer* 1 Ves. Jr. 416, 425; *Darlington v. Chamberlin* 120 Ill. 585.

(12) *Robson v. Kemp* 4 Esp. 233; *Copland v. Stein* 8 T.R. 199.

(13) Jones on Liens, sec. 430.

(14) *Terry v. Bamberger* 44 Conn. 558; *Willard v. White* 56 Hun (N.Y.) 581.

(15) *Hudson v. Granger* 5 B. & Ald. 27.

satisfy his advances, and the fact of advances having been made does not prevent the direction for sale from being revoked (16). The factor must first carry out the instructions accompanying the goods as to their disposal and the application of the proceeds; and the factor who accepts goods sent to him with a direction to pay over a part of the proceeds to a third person, can only claim a general lien on the surplus remaining after such payment (17).

The lien exists notwithstanding that the principal fixes the price at which the goods are to be sold, and that the factor sells in his principal's name (18). The nature of the factor's employment implies that he is authorized to sell in the usual course of business the goods consigned to him (19), but the principal may revoke or limit that authority (20).

The purchaser from the factor cannot set off against the price a debt due to him from the principal, except subject to the factor's lien (21), and if such purchaser pays over the proceeds to the principal after notice of the factor's lien he is liable to the factor for the amount of the lien (22).

Purchasing agent. An agent to purchase goods is entitled to a lien for advances made by him to make

(16) *Smart v. Sanders* 5 C.B. 805; *Raleigh v. Atkinson* 6 M. & W. 676.

(17) *Frith v. Forbes* 32 L.J. Ch. 10, 4 DeG.F. & J. 409; *Phelps v. Comber* (1885) 29 Ch. D. 813; *Brown v. Kough* (1885) 29 Ch. D. 848.

(18) *Stevens v. Biller* 25 Ch. D. 31.

(19) *Becherer v. Asher* 23 Ont. App. 205; *Ex p. Dixon* 4 Ch. D. 133; *Commercial Bank v. Heilbronner* 108 N.Y. 439.

(20) *Smart v. Sanders* 5 C.B. 805.

(21) *Atkins v. Amber* 2 Esp. N.P. 293.

(22) *Drinkwater v. Goodwin* 1 Cowp. 251.

the purchase, but not to a lien for a general balance due him from his principal (23).

If an agent is entrusted by his principal with money to buy goods the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing them. If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass, equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance (24).

Consignor not the owner Nova Scotia, British Columbia and N.W. Territories. By the Factors' Acts in force in these provinces it is enacted that where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall in respect of advances made to or for the use of such person have the same lien on the goods as if such person were the owner of the goods and may transfer any such lien to another person; but this provision is not to limit or affect the validity of any sale, pledge or disposition, by a mercantile agent (25). This enactment is taken from the Imperial Factors' Act (26).

Waiver of lien. Where the factor stands by and assents to the sale of the goods by his principal without

(23) *DeWolf v. Howland* 2 Paine (U.S.C.C.) 356.

(24) *Carter v. Long* 26 Can. S.C.R. 430.

(25) N.S. Laws 1895, c. 11, s. 7; R.S.B.C. 1897, c. 4, s. 8; Con. Ord. N.W.T. 1898, c. 40, s. 8.

(26) 52 & 53 Vict. (Imp.) c. 45, s. 7.

claiming his lien, he is estopped from setting it up as against the purchaser who bought in good faith without notice of same (27).

The lien may be waived by proving against the insolvent estate of the owner of the goods for the amount for which the lien is held, with knowledge that the goods on which the lien is claimed are included in the statement of the insolvent's assets as unencumbered, and without taking objection thereto before accepting a dividend from the estate (28).

The factor waives his lien by voluntarily giving up possession of the goods to his principal (29); and if, when the principal demands the goods, he refuses possession upon other grounds than his right of lien and fails to make a claim in respect of his lien, the lien is lost (30). So also, if the factor tortiously pledge the goods, he loses his right of lien (31); but a factor or agent is not guilty of theft, by pledging or giving a lien on any goods or document of title to goods entrusted to him for the purpose of sale or otherwise, for any sum of money *not greater* than the amount due to him from his principal at the time of pledging or giving a lien on the same, together with the amount of any bill of exchange accepted by him for or on account of his principal (32).

If the factor enters into a special contract which provides a mode of payment of his claim inconsistent

(27) *Stevens v. Robins* 12 Mass. 183; *Gragg v. Brown* 44 Me. 157.

(28) *Troop v. Hart* 7 Can. S.C.R. 512.

(29) *Kruger v. Wilcock*, Ambl. 252; *Bligh v. Davies* 28 Beav. 211.

(30) *Scarfe v. Morgan* 4 M & W. 271.

(31) *Holly v. Huggesford* 8 Pick. (Mass.) 76; *Jarvis v. Rogers* 15 Mass. 396.

(32) Cr. Code (Can.) sec. 305 (5).

with the continuance of a lien, the lien is waived (33); but drawing a bill of exchange for advances made is not inconsistent with a right of lien and is not to be considered a waiver (34).

A factor is bound to deliver to his principal within a reasonable time after demand thereof, a full and complete statement of his dealings with the goods, and of the account between them; and if he fails to do so he forfeits his lien (35).

Nova Scotia Factors' Act.—By the Nova Scotia Factors' Act of 1895 (36) it is enacted, that where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person. The statute expressly provides that this enactment is not to limit or affect the validity of any sale, pledge or disposition by a mercantile agent (37).

(33) *Cowell v. Simpson* 16 Ves. Jr. 275.

(34) *DeWolf v. Howland & Paine* (U.S.) 356.

(35) *Terwilliger v. Beals* 6 Lans. (N.Y.) 403.

(36) N.S. Laws 1895, c. 11, s. 7.

(37) Sec. 7 (2).

CHAPTER X.

LIENS FOR WAREHOUSING AND WHARFAGE.

Warehouseman's Lien.—A warehouseman has, by the common law, a specific lien on the goods which he stores, in respect of the storage charges (1). He is not bound to receive every article offered to him for storage; he has a right of selection both of person and of property, and need take only those goods, and from such persons as he chooses. His lien is, therefore, of a different character, as regards the rights of third parties, to that of a carrier or an innkeeper, who is under a legal obligation to receive goods (2). And it has been held that the warehouseman with whom the chattel mortgagor stores the mortgaged goods acquires no lien thereon for his charges as against the chattel mortgagee, if the mortgage is recorded so as to be valid as against a subsequent purchaser from the mortgagor (3).

When wheat or other merchandise is received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the identical goods are so mixed up with others that they cannot be returned, and the well-understood course of the business is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind and quality to be accounted for to him, the contract between the parties is really one of sale and not of bailment, whether the

(1) Jones on Liens, sec. 967; *Steinman v. Wilkins* 42 Am. Dec. 254.

(2) *Baumann v. Post* 12 N.Y. Supp. 213.

(3) *Storms v. Smith* 137 Mass. 201; *Baumann v. Post* 12 N.Y. Supp. 213.

vendor is to receive the price in money or an equal quantity of goods, or has an option to do either, as the property in the goods has passed to the warehouseman (4).

A workman who holds a chattel under detention in respect of his charges for repairing the same, is not entitled to an additional lien for himself storing the goods, although such a claim may constitute a debt from the owner for which an action might be maintained (5).

When carrier a warehouseman.—When a shipper stores goods from time to time in a railway warehouse loading a car when a carload is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers, but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company (6). Where the goods are yet to be graded, classified, marked or set apart from others by the shipper before they are ready for shipment, they cannot be deemed to be delivered to the carrier for carriage (7). So long as the goods remain in the railway warehouse subject to the plaintiff's control and are not to be put *in itinere* until something further has been done, the character of warehouseman is not changed into that of carrier (8).

(4) *Lawlor v. Nicol* (1898) 12 Man. R. 224.

(5) *British Empire Shipping Co. v. Somerset* E. B. & E. 353, 367; affirmed 8 H.L. Cas. 338.

(6) *Milloy v. Grand Trunk Ry.* (1894) 21 Ont. App. 404, reversing 23 Ont. R. 454.

(7) *St. Louis Ry. v. Knight* 122 U.S. 79.

(8) *Milloy v. Grand Trunk Ry.* (1893) 23 Ont. R. 454, 463, per Rose, J., affirmed 21 Ont. App. 404.

Petroleum warehouse receipts—Ontario. By the Mercantile Amendment Act of Ontario (9), the following special provision is made regarding transportation and warehouse receipts for crude petroleum in this province :—

All transportation and warehouse receipts, accepted orders and certificates for crude petroleum, issued by any company heretofore, or which may, at any time hereafter, be incorporated under competent authority, and authorized to carry on the business of warehousing, shall be transferable by endorsement, either special or in blank, and upon being endorsed in blank shall become transferable by delivery, and every such endorsement or transfer by delivery shall transfer all right of property and possession of the petroleum mentioned in any such transportation or warehouse receipt, accepted order or certificate, to the endorsee or transferee thereof, subject to the terms and conditions of such transportation or warehouse receipt, accepted order or certificate, as fully and completely as if a sale of the petroleum mentioned therein had been made in the ordinary way ; and on the delivery of any petroleum mentioned in such document, by such company, in good faith, to a person in possession of such transportation or warehouse receipt, accepted order or certificate, endorsed or transferred as aforesaid, the company shall be freed from all further liability in respect thereof, and the endorsee or transferee or holder of every such transportation or warehouse receipt, accepted order or certificate, to whom the property in the petroleum mentioned therein passes by reason of such endorsement or delivery, shall have transferred to and vested in him all rights of action and *be subject to the same liabilities* in respect of such petroleum as if the contract

(9) R.S.O. 1897, c. 145.

contained in the transportation or warehouse receipt, accepted order or certificate had been made by the company with himself (10).

Wharfinger's lien. The lien of a wharfinger is a commercial one and not founded on the common law. By usage long established it is considered as a settled point that a wharfinger has, in like manner to a factor, a general lien for the balance of account due him from the customer, and he is not restricted to a lien for charges or advances in relation to the particular property (11). The lien does not attach until the goods are landed at the wharf (12), and the claim for a general balance can be maintained only where the customer is the owner of the goods at the time of their arrival (13). So where the consignee sold the goods before their arrival it was held that the wharfinger could not hold them for the general balance due him from the consignee, although he had no notice of the sale until after the goods were landed (14).

If a wharfinger, in course of business with a customer, parts with the goods from time to time, receiving payment at the end of every six months or every year for all his dues, that course of business will prevent him from maintaining a lien as against such customer (15). It is not necessary that the proprietor of a wharf upon navigable waters, used for the loading

(10) R.S.O. 1897, c. 145, s. 12.

(11) *Naylor v. Mangles* 1 Esp. 109; *Spears v. Hartley* 3 Esp. 81; *Rex v. Humphrey* 1 McClel. & Y. 173, 194.

(12) *Syeds v. Hay*, 4 T.R. 260.

(13) *Richardson v. Goss* 3 B. & P. 119; *Crawshaw v. Homfray* 4 B. & Ald. 50.

(14) *Crawshaw v. Homfray* 4 B. & Ald. 50.

(15) *Crawshaw v. Homfray* 4 B. & Ald. 50.

and unloading of vessels, should have a warehouse, or shed, or other convenience for the storage of goods and protection thereof from the weather; and as such wharfinger he is entitled to a lien on goods unloaded at his wharf for money already due to him for wharfage (16).

If goods are landed in obedience to revenue regulations at a particular wharf or dock, the wharfinger becomes the master's agent and the goods remain in the constructive possession of the master, and may be held not only for the wharfage charges but for the freight due to the master of the ship (17).

And where goods are not required to be landed at any particular dock, and the common practice is to land them at a public wharf and to direct the wharfinger not to part with them until the freight charges are paid, the wharfinger becomes the master's agent, and the goods remain constructively in the possession of the master so as to preserve his lien (18).

The power of legislation concerning the collection of freight and of wharfage and warehouse charges in respect of merchandise rests solely with the Dominion Parliament and a Nova Scotia Provincial Act (19), was in consequence disallowed as *ultra vires*, on the recommendation of Sir John Thompson when Minister of Justice in 1887 (20).

Waiver of lien.—The mere fact of a warehouseman, who has a lien on goods for a certain sum for

(16) *Sills v. Bickford* 26 Grant (Ont.) 512; *Renald v. Walker* 8 U.C.C.P. 37; *Llado v. Morgan* 23 U.C.C.P. 517.

(17) *Wilson v. Kymer* 1 M. & Sel. 157, 162, *Faith v. East India Co.* 4 B. & Ald. 630.

(18) Angell on Carriers, 372; Kay on Shipmasters, sec. 313.

(19) N.S. Laws, 1886, c. 56.

(20) Lefroy's Legislative Power in Canada, 643 n; Hodgins' Provincial Legislation 2nd ed. 558.

storage, claiming also to hold them for an untenable claim as payable to himself or to a third person, does not dispense with a tender of the sum due, nor amount to a conversion of the goods, unless the evidence fairly warrants the conclusion that such tender would be useless as it would be refused (21).

Where a firm stored wheat in warehouse and gave in payment of warehouse charges a draft on their own firm payable in another city, whereupon the warehouseman receipted the account, but after acceptance of the draft but before its maturity the firm became insolvent, it was held that the warehouseman could not enforce a lien during the currency of the bill (22).

A right of lien is not lost by delivering the goods to common carriers for carriage subject to it, or by accepting from the carriers the amount of his charges thereon with authority to the latter to collect same at destination (23). And where goods are received from the same owner in one transaction, the warehouseman may release a part of them and hold the remainder for the charges against them all (24).

(21) *Llado v. Morgan* 23 U.C.C.P. 517.

(22) *Renald v. Walker* 8 U.C.C.P. 37.

(23) *Hayward v. G. T.R.* 32 U.C.R. 392.

(24) *Schmidt v. Blood* 9 Wend. (N.Y.) 268; *Steinman v. Wilkins* 7 W. & S. 466.

CHAPTER XI.

LIENS OF CARRIERS.

Carrier has a specific lien.—A common carrier has a specific lien upon the goods carried, for his hire in carrying them (1). It is a common law right to retain the goods until he is paid for his services but confers no right of property. It attaches only to the specific goods in the possession of the carrier and secures only the unpaid price for the carriage of those specific goods (2). The carrier can only acquire a lien by a contract express or implied for a general balance of account or for transportation charges on goods previously delivered (3).

If the consignee on receiving a railway freight advice note calls at the railway warehouse and obtains permission to leave the goods there, nothing being said about storage, the railway company thereafter holds the goods with the liabilities of warehousemen only, and not as carriers (4). And when a shipper stores goods from time to time in a railway warehouse, loading a car when a car-load is ready, the responsibility of the railway company in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, and in case of their accidental destruction by fire, the shipper has no remedy against the company (5).

The payment of the freight and the delivery of the goods are ordinarily to be concurrent acts. The

(1) *Skinner v. Upshaw* 2 Ld. Raym. 752.

(2) *Leonard v. Winslow* 2 Grant (Ont.) 139.

(3) *Rushforth v. Hadfield* 7 East 224.

(4) *Mayer v. Grand Trunk Ry.* U.C.C.P. 248.

(5) *Milloy v. Grand Trunk Ry.* (1894) 21 Ont. App. 404.

carrier is not bound to deliver the cargo unless the consignee stands ready to pay the freight at the same time. On the other hand, the carrier is not entitled to demand the freight unless he is ready to deliver the cargo. There must be a concurrent readiness on both sides, — on the one to deliver and on the other to pay (5*a*). The consignee cannot insist upon a delivery of any part until the whole freight is paid (6). If the goods are in distinct parcels and the freight charges are divisible, the carrier may require the freight on each separate parcel to be paid on its delivery, and may make delivery of parcels separately (7). If a part of the goods are delivered without an insistence on payment of any of the freight, the lien is, of course, lost as to the part delivered; but it will remain in full force upon the remainder for the payment of the total charge (8).

The carriers are entitled to a lien notwithstanding that the goods were delivered to them by a person who had stolen them (9).

Carriers by water.—Under the Canadian 'Act respecting the liability of carriers by water' (10), it is declared and enacted that "carriers by water shall, at the times and in the manner and on the terms of which they have respectively given public notice, *receive and convey*, according to such notice, all persons applying for passage and all goods offered for conveyance, unless in either case there is reasonable and sufficient

(5*a*) *Black v. Rose* 2 Moore P.C.N.S. 277.

(6) *Perez v. Alsop* 3 F. & F. 188.

(7) *Black v. Rose* 2 Moore P.C.N.S. 277.

(8) *Ex p. Cooper* 11 Ch. D. 68.

(9) *Yorke v. Genaugh* 2 Ld. Raym. 866.

(10) R.S.C. 1886, c. 82.

cause for not doing so (11). Carriers by water are responsible not only for goods received on board their vessels, but also for goods delivered to them for conveyance by any such vessel, and are bound to use due care and diligence in the safe keeping and punctual conveyance of such goods, subject to the provisions of the statute (12).

The shipowners, and the shipmaster as their agent, have a lien on the goods for the amount of the freight (13), and cannot be compelled to part with them until the freight is paid although the freight is payable 'on the delivery of the cargo' (14); the payment of freight and the delivery of the cargo are, in that case, to be considered as concurrent acts. But if the contract provides that the freight shall not be payable until *after* the delivery of the cargo, there is no right of lien (15). A contract to pay freight is implied from the fact that the shipper placed the goods on board to be carried (16). Freight is payable on the arrival of the goods at the port of destination ready to be delivered; and if the goods be lost on the voyage (17), or if their owner be compelled against his will to receive them at an intermediate port (18), or if the ship has been properly abandoned without any intention of resumption and is subsequently brought into

(11) R.S.C. 1886, c. 82, s. 2.

(12) R.S.C. 1886, c. 82, s. 2 (2).

(13) *Kirchner v. Venus* 12 Moo. P.C. 361.

(14) *The Energie* L.R. 6 P.C. 306, 314.

(15) *Foster v. Colby* 3 H. & N. 705; *Alsager v. St. Katherine's Dock Co.* 14 M. & W. 794.

(16) *Domett v. Beckford* 5 B. & Ad. 521.

(17) *Kirchner v. Venus* 12 Moo. P.C. 361, 390.

(18) *The Soblomsten*, L.R. 1 Ad. 293, 297; *Metcalf v. Britannia* 2 Q.B.D. 423.

port by salvors (19), no freight is payable. Freight will be payable in respect of *part* of the goods carried although all of them are not carried, unless the charter-party make the carriage of the whole a condition precedent to the earning of any freight (20). If the ship be prevented from completing the voyage, the master may still earn the whole freight either by repairing her and within a reasonable time carrying on the goods, or by sending them within a reasonable time in another ship, to their destination (21).

Where the master, in order to preserve the cargo from a danger which has not arisen from any default of the shipowner or his servants, properly incurs an extraordinary expense or makes a sacrifice in taking such measures as a prudent man would think most conducive to the benefit of the cargo-owners concerned, he has a lien on all the goods for whose preservation the expense is incurred or sacrifice made (22). This lien arises whether the expense be for the preservation of particular goods or such as would be the subject of a 'general average' contribution (23).

There is, however, no lien in favor of the shipowner in the absence of an express agreement, or of usage having the force of law, for demurrage (24), or for wharfage (25), or for pilotage or port charges (26),

(19) *The Kathleen*, L.R. 4 Ad. 269; *The Cito*, L.R. 7 P.D. 5.

(20) *Dakin v. Oxley* 15 C.B.N.S. 646, 665.

(21) *Benson v. Chapman* 2 H. L. Cas. 696, 720; *Matthews v. Gibbs* 3 El. & El. 282, 300; Kay on Shipmasters sec. 272.

(22) Kay on Shipmasters sec. 294.

(23) *Hingston v. Wendt* 1 Q.B.D. 367; *Huth v. Lamport* 16 Q.B.D. 736; *Crooks v. Allan* 5 Q.B.D. 38.

(24) *Phillips v. Rodie* 15 East 547.

(25) *Bishop v. Ware* 3 Camp. 360.

(26) *Faith v. East India Co.* 4 B. & Ald. 630.

or for "dead freight," *i.e.*, damages for not loading a full cargo, unless so fixed by the charter-party as to be ascertainable by calculation (27).

The shipowner, and the master as his agent, must be, in law, in possession of the ship in order to support the right of lien apart from contract; and if possession be given to a charterer in such a way that the master ceases to be the servant of the shipowner and becomes the agent of the charterers, the shipowner has no lien on the goods unless he has expressly reserved it by agreement (28). Where it is the common practice to land the goods at a public wharf and to direct the wharfinger not to part with them until the charges upon them are paid (29), or where by revenue regulations the goods are required to be landed at a particular wharf (29*a*), the wharfinger becomes the master's agent, and the goods remain in the constructive possession of the master and his lien is retained. But the lien will be lost if the master voluntarily parts with the possession of the goods in the hands of himself or of his agent, and he cannot afterwards reclaim them (30).

Lien dependent upon performance of contract.—The carrier's right to freight, and to detain the goods for its payment, results from his performance of the contract to carry the goods. If he fails to carry the goods and to have them ready for delivery, he cannot claim his freight. If through his fault the goods are

(27) *Gray v. Carr*, L. R. 6 Q.B. 522, 558; *McLean v. Fleming* L. R. 2 H. L. Sc. 128.

(28) *Small v. Moates* 9 Bing. 574, 589.

(29) *Angell on Carriers* 372.

(29*a*) *Wilson v. Kymer* 1 M. & Sel. 157, 162; *Faith v. East India Co.* 4 B. & Ald. 630.

(30) *Artaza v. Smallpiece* 1 Esp. 23; *Angell on Carriers* 370.

damaged to an amount in excess of the freight, he is not entitled to demand anything for the carriage of the goods; and if the damages be less than the freight charges, the amount he is entitled to demand is reduced to that extent. If by reason of such injury to the goods he is not entitled to demand any freight, he has no right to retain the goods for the payment of freight, and if he does so they may be taken from him by replevin (31).

There is no good reason why the carrier's liability for damages to the goods accruing through his fault, should not be asserted and determined by way of defence to the claim for freight as well as by a cross-action; it would be contrary to the analogies of cases involving similar relations of subject-matter and parties, to say nothing of the hardships to the consignee, to require him to pay the freight upon the goods, and then to trust to the responsibility of the carrier at the end of a lawsuit for the recovery of the damages to the goods sustained through the fault of the carrier (32).

Statutory rights under the Railway Act (Canada).---

In case of denial or neglect of payment on demand of any 'tolls' due to a railway company within the legislative authority of the Dominion Parliament the same are by the Railway Act of Canada made recoverable in any court of competent jurisdiction. The expression 'toll' includes any rate or charge (33). made for the convenience of any passenger, goods, or carriage, or for the collection, loading, unloading, cording or delivery of goods, or for warehousing or

(31) Jones on Liens, sec. 331.

(32) *Dyer v. Grand Trunk Ry.* 42 Vt. 441, per Barrett, J.

(33) 51 Vict. (Can.) 188J, c. 29, § 234.

for wharfage, or other services incidental to the business of a carrier (34). The agents or servants of the company may seize the goods for or in respect whereof the tolls are payable, and may detain the same until payment thereof, and in the meantime the goods are at the risk of the owners (36). If the tolls are not paid within 6 weeks, the company may sell the whole or any part of such goods, and out of the money arising from such sale retain the tolls payable, and all reasonable charges and expenses of such seizure, detention and sale, and shall deliver the surplus, if any, or such of the goods as remain unsold, to the person entitled thereto (37).

If any goods remain in the possession of the company unclaimed for 12 months, the company may thereafter, and on giving public notice thereof by advertisement for 6 weeks in the official Gazette of the province in which such goods are, and in such other newspapers as it deems necessary, sell such goods by public auction at a time and place which shall be mentioned in such advertisement, and out of the proceeds thereof pay such tolls and all reasonable charges for storing, advertising and selling such goods (38). The balance of the proceeds, if any, must be kept by the company for a further period of 3 months to be paid over to any person entitled thereto; and in default of its being claimed within that time, it shall be paid over to the Minister of Finance and Receiver General for the public uses of Canada until claimed by the person entitled thereto (39).

(34) 51 Vict. (Can.) 1888, c. 29, sec. 2 (*n*).

(36) Railway Act (Can.) sec. 234.

(37) Sec. 235.

(38) Sec. 236.

(39) Railway Act (Can.) 1888, s. 236, 237.

Separate consignments under one contract.—If the goods are carried under one contract the lien will attach upon any one or more of the parcels notwithstanding that they were delivered to the carrier at different times (40). If several bills of lading are given in respect of several parcels shipped by the same consignor to the same consignee, and the bills of lading are transferred to different persons, the carriers will not have a lien for the freight due in respect of one of such separate parcels upon the goods contained in another parcel covered by another bill of lading (41).

Separate liens changed to one general lien.—If several cargoes of coal are carried by a railway company to the same consignee under contract entitling the company to no more than a separate lien upon each cargo for the freight due in respect of same, and the coal is mixed together in bins upon the company's land by direction of the consignee so that they cannot be distinguished, then all the coal will be regarded in law as delivered together, and the separate lien upon each cargo will merge into a general lien upon the whole quantity (42); and, although the company allow coal to be withdrawn from time to time by the consignee for delivery to purchasers from him, their lien will remain good for the freight on all the cargoes, and they may prevent the taking away of any more of the coal without payment of the unpaid freight.

Refusal to pay freight.—The lien is not affected by the refusal of the consignee to accept the goods (43).

(40) *Chase v. Westmore* 5 M. & S. 180.

(41) *Sodergren v. Flight* 6 East 622.

(42) *Lane v. Old Colony Ry.* 14 Gray (Mass.) 143; Jones on Liens, sec. 321.

(43) *Westfield v. Great Western* 52 L.J. Q.B. 276.

Upon the refusal of the consignee to accept the goods and pay the freight, the carrier is not entitled to take the goods back forthwith to the place from which they were shipped; he is bound to keep them for a reasonable length of time at the place where they were to be delivered, so as to give the consignee an opportunity of obtaining the goods upon paying the carrier's demand (44). If the goods are left in the carrier's hands without fault on his part, he is bound to take reasonable measures for their preservation, and may recover the expenses so incurred, and maintain a lien therefor (45).

Connecting lines.—Where there are several successive carriers and each succeeding carrier pays the back freight charges to the immediate carrier from whom he receives the goods and the last carrier claims his own freight charges *plus* all back charges paid by him, it is not by any means clear that the last carrier can collect the whole sum thus charged, or that he has a lien on the goods for what he may claim as his own freight charges and the advances paid by him. If the first carrier has received the goods to be transported to the place to which they are finally carried, with no stipulation in the contract as to price, and no condition limiting his responsibility to the time when the goods are delivered to the next carrier, or providing that money paid for the conveyance beyond this terminus is received only for payment to the next carrier, the consignor's contract is with the first carrier alone, and all the successive carriers are the mere agents of the first carrier, and can of right assert no lien in respect of the charges for freight or carriage

(44) *Great Western v. Crouch* 3 H. & N. 183.

(45) *Great Northern v. Swaffield*, L.R. 9 Ex. 132.

between the two termini, except as the assignee or agent of the first carrier.

There may be a lien on the goods for the reasonable and fair freight and the right to assert this lien may rest in the last carrier not as an independent and absolute right in himself but as the assignee and agent of the first carrier; the consignee is liable to pay the reasonable and fair freight *quantum meruit*, but not the money advanced by the last carrier to preceding carriers simply because he has paid it, nor the freight of the last carrier simply because he makes the charge. The last carrier may be considered the agent of the first carrier and assert a right to recover in his name, or he may be considered as the assignee of the first carrier, but in either case he is in no better position than the first carrier with whom the contract was made, and can recover only what is reasonable and fair, *quantum meruit* (46).

In the United States it is held that a railroad receiving goods consigned to a place beyond its own line is clothed with the apparent authority of the consignor to forward the goods by any usual route; and where the first carrier was instructed to forward by a specified railway from the place of transshipment but disregarded the instructions and forwarded the goods by another railway company, the latter was held to be entitled notwithstanding to a lien for its own charges and for prior charges paid to other carriers (47).

Mr. Justice Brewer in delivering his judgment in the *Patten* case said: "Any other rule would work "a serious hindrance to the immense transportation "business of to-day, while this rule protects both

(46) *Trotter v. Red River Transportation Co.* (1879) Man. Rep. temp. Wood 255.

(47) *Patten v. Union Pacific Ry.* 29 Fed. Rep. 590; but see contra *Fitch v. Newberry* 40 Am. Dec. 33, 1 Doug. (Mich.) 1.

"carrier and owner. If the first carrier disobeys his instructions by which loss results to the owner, such carrier is liable to an action of damages, and, as is proper, the wrongdoer suffers the loss. At the same time the second and innocent carrier having done the work of transportation receives, as he ought, the just freight therefor. The first carrier is the agent of the owner; if he has done wrong, why should not the principal be remitted to his action against his wrong-doing agent, and why should the burden of litigation be cast upon the innocent second carrier? . . . And why should the owner, who has had his goods carried to the place of destination, be permitted to take them from the carrier without any payment for such transportation? Is the route by which the freight is transported a matter so vital to him that, carried over the wrong route he is entitled equitably to the possession of his goods free from any burden of freight?" (48).

By general usage the last carrier pays all prior freight charges, and he has a lien for previous freight charges paid by him upon the goods, as well as for his own charge. Business could not well be conducted unless the succeeding carrier were protected in making such payment. If a carrier employs another carrier in his place to forward the goods the latter has a lien, unless payment has been made to the carrier who received the goods in advance. And in the case of connecting carriers the last carrier who has received and transported the goods without notice that a former carrier has receipted for all charges through to the destination of the goods, is entitled to a lien for his own charges (49). But if the goods are received

(48) *Patten v. Union Pacific* 29 Fed. Rep. 590

(49) Jones on Liens sec. 298; *Wolf v. Hough* 22 Kans. 659.

from the previous carrier with knowledge that a contract for carrying them has been made and the through freight prepaid to the previous carrier, he is bound by that contract and has no lien upon the goods (50).

Where, however, the payment of charges has been made in advance and the contract does not imply that there shall be a delivery of the goods to a connecting or other carrier, a carrier employed by the contracting carrier to act in substitution for himself will have no lien, but must look to the person who employed him (51). If the last carrier has paid to a previous carrier excessive and improper charges the lien will be restricted to reasonable rates (52).

The mere fact that the carrier has paid charges upon the goods does not enable him to retain them for more than the usual and proper charges for their transportation, nor for any charges disconnected with the cost of transportation. A prior debt due to the forwarding agent from the shipper and prepaid by the carrier will not justify the detention of the goods by the latter against the consignee (53).

Demurrage.—Demurrage is an allowance which marine law makes by way of indemnity to the carrier where the vessel has been detained unreasonably long in loading or unloading the cargo through the fault of the customer (54). If the right exists at all so as to afford a lien independently of contract, statute, or

(50) *Marsh v. Union Pacific* 3 McCrary R. (U.S.) 236, 9 Fed. R. 873.

(51) *Nordmeyer v. Loescher* 1 Hilton (N.Y.) 499.

(52) *Travis v. Thompson* 37 Barb. (N.Y.) 234; *Mallory v. Burrett* 1 E. D. Smith (N.Y.) 234.

(53) *Virginia v. Kroft* 25 Mo. 67.

(54) Schouler on Bailments 3rd ed., sec. 540.

usage tantamount to law, it is confined to carriage by water; and while railroad carriers may store in case of delay, and charge storage rates, or perhaps sue for special damage, they cannot apart from contract or statutory sanction claim demurrage nor enforce such a claim by a lien upon the goods (55).

Lien on passenger's baggage.—Carriers of passengers have the same lien upon the passenger's baggage for the recovery of his fare as they would have for the carriage of his goods, and this lien will cover not only the baggage given over to the care of the carrier to be re-delivered to the passenger at his destination, but such baggage as the passenger takes with him into the passenger coach (56).

The lien on a passenger's baggage is lost if the passenger re-takes the baggage into his personal control and possession before the carrier takes possession of it (57).

The passenger is entitled to a reasonable time after his baggage is placed upon the railway platform, at the end of the journey, to call for it and take it away (58). When the carriers put the passenger's baggage on the platform, or other usual place of delivery, ready to be delivered to the passenger, as they are bound to do, the owner is under an obligation to call for and receive it within a reasonable time (59). And, if the passenger elects to leave the baggage

(55) *Chicago Ry. v. Jenkins* 103 Ill. 588; Schouler's Bailments, sec. 540.

(56) *Hutchings v. Western Ry.* 71 Am. Dec. 156; *Higgins v. Bretherton* 5 C. & P. 2.

(57) *Emerson v. Niagara Navigation Co.* (1883) 2 Ont. R. 528.

(58) *Penton v. Grand Trunk Ry.* (1871) 28 U.C.R. 367; *Hall v. Grand Trunk Ry.* 34 U.C.R. 517.

(59) *Shepherd v. Bristol & Exeter Ry.*, L.R. 3 Ex. 189.

unclaimed until the next day after it is ready to be delivered to him, their liability as carriers is at an end, and, if they place the goods in a baggage room or warehouse, they are not under any higher liability than that of warehousemen (60).

Waiver.—The carrier waives his lien by delivering the goods without first obtaining payment of the charges for carriage (61). If the master of a vessel voluntarily deposit the goods in a warehouse on landing them and so give another person a lien on them, the master loses his own lien for the freight even though such other person should undertake with him not to deliver the goods to the consignee without being paid the freight charges (62); but if the goods are taken out of the ship *in invitum* and by compulsion of law, the lien will be preserved at the place where the goods are deposited by law (63).

The carrier's lien is not lost in case the goods are obtained from him by fraud; he has not in such case voluntarily parted with the possession. His *right* of possession remains and he may assert this right by replevying the goods, though they be in the hands of the consignee (64). A right of lien for freight is not lost by demanding in addition some other charges not recoverable, provided the amount of freight for which a lien in fact existed was not tendered (65). If the bill of lading represents the freight to have been paid, when in fact it not not been paid, that will

(60) *Vineberg v. Grand Trunk Ry.* (1886) 13 Ont. App. 93, 99.

(61) *Bigelow v. Heaton* 4 Denio (N.Y.) 496.

(62) *Mors-le-Blanch v. Wilson* L.R. 8 C.P. 227.

(63) *Wilson v. Kymer* 1 M. & S. 157.

(64) *Wallace v. Woodgate, Ry. & M.* 193; *Bigelow v. Heaton* 4 Denio (N.Y.) 496.

(65) *Buffalo and Lake Huron Ry. v. Gordon* 16 U.C.R. 283.

constitute an estoppel against a claim of the freight as regards a transferee of the bill of lading for value (66); and a lien is waived by the carrier obtaining the goods to be seized by the sheriff under an execution at his suit (67).

(66) *Tamvaco v. Simpson* L.R. 1 C.P. 363; *Howard v. Tucker* 1 Barn. & Ad. 712.

(67) *Re Coumbe* 24 Gr. (Ont.) 519.

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CHAPTER XII.

WOODMEN'S LIENS AND LIENS FOR TIMBER DUES.

Woodmen have no common law lien.—Woodmen or labourers employed in cutting, hauling and driving timber had, at common law, no lien upon the timber (1), for, from the nature of the employment, they could not retain possession of the timber.

Property in growing timber.—Where the owner of timbered land has verbally agreed to sell growing timber to another, the property in the trees passes to the buyer as soon as the trees are severed from the freehold and notwithstanding a dispute between the parties as to what was the price agreed upon; but the landowner has a lien upon the timber for the price, and the purchaser is not entitled to remove them without satisfying the lien (2).

Where the landowner sold and conveyed the timber and cordwood thereon and the purchaser gave his note in payment and took possession, and after cutting the timber resold it and absconded without paying the note, the landowner was held to have no lien (3).

In *McLeod v. New Brunswick Railway Company* (4) the respondent company were owners of timber lands in New Brunswick and granted C. & S. a license to cut on twenty-five square miles. By the license it was agreed, inter alia, as follows:

(1) *Oakes v. Moore* 24 Me. 214; *Arians v. Brickley* 65 Wis. 26; *Oliver v. Woodman* 66 Me. 54.

(2) *McCarthy v. Oliver* 10 C.L.J. 130, (A. Wilson, J.); 14 U.C.C.P. 290.

(3) *Wyatt v. Bank of Toronto*, 8 U.C.C.P. 104.

(4) *McLeod v. New Brunswick Ry. Co.* 5 Can. S.C.R. 281.

"Said stumpage to be paid in the following manner: said company shall first deduct from the amount of stumpage on the timber or lumber cut by the grantees on this license as aforesaid, an amount equal to the mileage paid by them as aforesaid, and the whole of the remainder, if any, shall, not later than the 15th of April next, be secured by good endorsed notes, or other sufficient security to be approved of by the said company, and payable on the 15th July next, and the lumber not to be removed from the brows or landings till the stumpage is secured as aforesaid. And said company reserves and retains full and complete ownership and control of all lumber which shall be cut from the afore-mentioned premises, wherever and however it may be situated, until all matters or things appertaining to or connected with this license shall be settled and adjusted and all sums due or to become due for stumpage or otherwise shall be fully paid, and any and all damages for non-performance of this agreement, or stipulations herein expressed, shall be liquidated and paid. And if any sum of money shall have become payable by any one of the stipulations or agreements herein expressed, and shall not be paid or secured in some of the modes herein expressed within ten days thereafter, then, in such case, said company shall have full power and authority to take all or any part of said lumber wherever or however situated, and to absolutely sell and dispose of the same either at private or public sale, for cash: and, after deducting reasonable expenses, commissions and all sums which may then be due or may become due from any cause whatever, as herein expressed, the balance, if any there may be, they shall pay over on demand to said grantees, after a reasonable time for ascertaining and liquidating all amounts due, or which may become due, either as stumpage or damage."

For securing the stumpage payable to respondents under this license, C. & S. gave to the respondents a draft upon J. & Co., which was accepted by J. & Co., and approved of by the respondents, but which was not paid at maturity. After giving the draft C. & S. sold the lumber to J. & Co., who knew the lumber was cut on the plaintiff's land under the said agreement. J. & Co. failed, and appellant, their assignee, took possession of the lumber and sold it. It was held by the Supreme Court of Canada, [Per Strong, Taschereau and Gwynne, J.J., (affirming the judgment of the court below), Ritchie, C.J., and Fournier and Henry, J.J., dissenting] that upon the case as submitted, and by mere force of the terms of the agreement, the absolute property in the lumber in question did not pass to C. & S. immediately upon the receipt by the company of the accepted draft of C. & S. on J. & Co., and that appellant was liable for the actual payment of the stumpage (5).

Where timber standing upon any land registered under the Ontario Land Titles Act is sold under an agreement in writing, the purchaser instead of entering a caution, may deposit the agreement with the Master of Titles of the county, city, town, or district; and such Master, upon proof of the due execution thereof by the owner, shall register the same as an incumbrance upon the land by entering a memorandum upon the register of the parcel, referring to the instrument and giving shortly the effect thereof (6).

Extent of statutory lien.—In the Provinces of Ontario, Quebec, British Columbia and Manitoba statutes have been passed giving a lien to woodmen

(5) *McLeod v. New Brunswick Ry. Co.* 5 Can. S.C.R. 281.

(6) R.S.O. 1897, c. 138, s. 80.

and others engaged in getting out timber and bringing it to market. If the services have been in conjunction with several others, as where a number of teamsters are engaged in hauling logs which are thereafter mixed together, the lien is not limited as to each to the identical logs he has hauled although the employment of each is separate, but it may in such case be enforced by any of them against any portion of the lot of logs upon which he and the others worked (7). And if the owner intermingle logs of a particular mark and upon which there is a woodman's lien, with others bearing the same mark also belonging to him, and the former cannot be distinguished, the lien is enforceable against all of them (8); but if several owners separately employ the same drivers, and in the drive all the logs become intermixed, the liens are not collectively upon the whole mass of logs, but upon the logs of each owner separately for the proportionate amount of labor bestowed thereon (9).

Woodman's Lien—British Columbia.—A statute respecting the lien of woodmen for wages was passed in British Columbia in 1895 (10), in many respects similar to the Woodman's Lien Act of New Brunswick passed in the previous year, and to the Woodmen's Lien Act of Manitoba passed in 1893.

Any person performing any labor, service or services in connection with any logs or timber in the province of British Columbia has a statutory lien thereon for the amount due, subject only to timber dues or charges payable to the Crown, and to tolls due

(7) *Jacubeck v. Hewitt* 61 Wis. 96; *Kline v. Comstock* 67 Wis. 473.

(8) *Parker v. Williams* 77 Me. 418.

(9) *Hamilton v. Buck* 36 Me. 536; *Oliver v. Woodman* 66 Me. 54
Appleman v. Myre 74 Mich. 359.

(10) B.C. Acts 1895, c. 58; R.S.B.C. 1897, c. 194.

to any timber slide company or owner of slides and booms (11). The right of lien extends to cooks, blacksmiths, artisans and all others usually employed in connection with the "cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber" (12). This statutory lien does not attach to or remain a charge on the logs or timber unless and until a statement thereof in writing, verified upon oath by the person claiming such lien or someone duly authorized on his behalf, shall be filed in the office of the Registrar of the County Court having jurisdiction in the county, district or portion of district, in which the labor or service or some part thereof has been performed; or if in a part of the province beyond the jurisdiction of any county court, then with the nearest British Columbia Government agent (13). The lien statement in statutory form (14) or to the like effect must be filed within 30 days after the last day upon which the services were performed, and must set out briefly the nature of the debt, demand or claim, the amount due to the claimant, as near as may be, over and above all legal set-offs or counterclaims, and a description of the logs or timber upon or against which the lien is claimed (15).

No sale or transfer during the time so limited for filing and previous to the filing, or during the time limited after the filing for enforcing the lien will affect the same, except as to "sawn timber sold in the ordinary course of business" (16). The lien will ter-

(11) R.S.B.C. c. 194, s. 3.

(12) R.S.B.C. 1897, c. 194, s. 2.

(13) R.S.B.C. 1897, c. 194, s. 4.

(14) Schedule to R.S.B.C. 1897, c. 194.

(15) R.S.B.C. 1897, c. 194, ss. 5, 6.

(16) R.S.B.C. 1897, c. 194, s. 6.

minate, unless proceedings to enforce the same are commenced within 30 days after the filing of the lien statement, or after the expiry of the period of credit, by suit in the County Court where such lien is filed, provided the sum claimed is within the jurisdiction of such court, and otherwise in the Supreme Court of British Columbia (17). The County Courts have jurisdiction in all personal actions where the debt or damages claimed do not exceed \$1,000, and in all actions where the debt or demand claimed consists of a balance not exceeding \$1,000 after an admitted set-off of any debt or demand claimed or recovered by the defendant from the plaintiff (18).

A seizure or detention under the Woodman's Lien Act is not authorized as to any logs or timber in transit from the place where cut to the place of destination, when such place of destination is within the district in which the proceedings under the Act have been commenced; but in case such logs or timber are so in transit, or are in the possession of any booming company or other person or corporation for the purpose of being driven or sorted and delivered to the owners, or to satisfy any statutory lien, then attachment of said logs or timber may be made by serving a copy of the attachment upon the person or corporation drawing or holding the same, who shall from the time of such service be deemed to hold the same both on their own behalf and for the sheriff to the extent of the lien, until the logs or timber can be driven and sorted out (19).

By the British Columbia Mechanics' Lien Act (20),

(17) R.S.B.C. 1897, c. 194, s. 7.

(18) R.S.B.C. 1897, c. 52, s. 24.

(19) R.S.B.C. 1897, c. 194, s. 16.

(20) R.S.B.C. 1897, c. 132.

it is enacted that every person making or entering into any contract, engagement or agreement with any other person for the purpose of furnishing, supplying or obtaining timber or logs, by which it is requisite and necessary to engage and employ workmen and labourers in the obtaining, supplying and furnishing such logs or timber as aforesaid, shall, before making any payment for or on behalf of or under such contract, engagement or agreement, of any sum of money, or by kind, require such person to whom payment is to be made to produce and furnish a pay-roll or sheet of the wages and amount due and owing, and of the payment thereof (or if not paid, the amount of wages or pay due and owing), to all the workmen or labourers employed or engaged on or under such contract, engagement or agreement at the time when the said logs or timber is delivered or taken in charge for, or by or on behalf of, the person so making such payment and receiving the timber or logs (21). The pay-roll may be in the form provided in the schedule to the Act, which includes the name of the workman, the number of days employed within the period which the pay-roll purports to cover, the rate of wages per day, total amount earned, the amount paid, date of payment and the signature of the workman to the roll by way of receipt in full.

If a person makes any payment under any such contract engagement or agreement without requiring the production of the pay-roll he will be liable, at the suit of any workman or labourer engaged under the contract, to pay the amount due and owing to the workman or labourer (22). The person to whom such pay-roll is given must retain for the use of the labourers or workmen whose names are set out in

(21) R.S.B.C. 1897, c. 132, s. 26.

(22) Sec. 27.

such pay-roll the sums set opposite their respective names which have not been paid, and the receipts of the labourers or workmen therefor will be a sufficient discharge (23).

Woodman's Lien New Brunswick.—By an Act of the General Assembly of New Brunswick passed in 1894 (24) any person performing any labor or services in connection with any logs or timber intended to be driven down rivers or streams, or hauled directly from the woods, or brought by railway to the place of destination, is given a lien thereon for the amount due for cutting, skidding, felling, hauling, scaling, barking, driving, rafting or booming any logs or timber, and any work done by cooks, blacksmiths, artisans or others used or employed in connection therewith; and the same shall be deemed a first lien or charge on such logs or timber, and shall have precedence over all the claims or liens thereon, except any lien or claim which the Crown may have for dues or charges, or which the landowner may have for stumpage, or which any Streams Improvement Company or Boom Company, or person owning streams, improvements or booms, may have thereon for or in respect of tolls (25). The lien, however, does not attach or remain a charge on the logs or timber, unless and until a written statement setting out briefly the nature of the claim, including a description of the logs or timber, and verified by the oath of the claimant, or of someone duly authorized on his behalf, is filed in the office of the Clerk of the County Court in which the labor or services or part thereof have been performed (26).

(23) Sec. 28.

(24) 57 Vict. N.B., c. 24.

(25) 57 Vict. N.B., c. 24, ss. 1, 3.

(26) 57 Vict. N.B., c. 24, ss. 4, 5.

The lien statement should be in the statutory form (27), and, if in respect of work done in the woods, must be filed within 30 days after the last day on which such labor or services were performed; and if in respect of work done in river driving or otherwise than in the woods, then within 20 days after the last day on which such labor or services were performed (28).

In a recent case under this Act the facts were that B. and others were employed by the month to work in the woods. They began operations in November, 1894, and voluntarily quitted on January 25th, 1895. On March 14th of the same year, though not requested to do so, they returned, and after working two days again stopped. They then filed a claim under the provisions of the Act. It was held that the returning to work on March 14th was not a *bona fide* continuation of the work, and that the right to enforce a lien was gone by reason of lapse of time (29).

A special mode of enforcing such liens by summary proceedings before a County Judge is provided by the Act; and it is enacted that no sale or transfer of the logs or timber during the time limited for filing, or during the time after filing limited for enforcing the lien, shall affect the same (30).

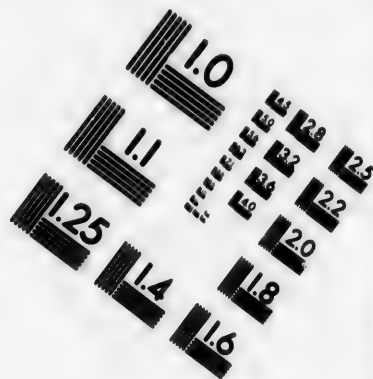
Woodman's Lien—Manitoba.—In Manitoba any person performing any labour service or services in connection with any logs or timber including telegraph poles, railway ties, shingle bolts or staves, and fence posts and cordwood while lying piled for shipment by

(27) Schedule 1 of 57 Vict. N.B., c. 24.

(28) 57 Vict. N.B., c. 24, s. 6.

(29) *Guimond v. Belanger*, 33 N.B.R. 589.

(30) 57 Vict. (N.B.) c. 24, s. 6.



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rail or water (31) has a statutory lien thereon for the amount due, *not exceeding* the sum of \$250, for 'labour, service or services' including in such term the cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming, and also any work done by cooks, blacksmiths, artisans and others usually employed in connection therewith (32). It is declared by the statute that this statutory lien shall have precedence of all other claims or liens on the logs or timber, except any lien or claim which the Crown may have for any dues or charges (33). The lien does not attach or remain a charge on the logs or timber, unless and until a statement thereof in writing verified upon oath by the person claiming the lien, or some one duly authorized on his behalf, and bearing endorsed thereon the name and post office address of the claimant's attorney, is filed in the office of the clerk of the county clerk of the division in which the labour or services or some part thereof has been performed (34). The statement must set out briefly the nature of the debt, demand or claim, the amount due to the claimant as near as may be over and above all legal set-offs or counterclaims, and a description of the logs or timber; and it may be in the form set forth in the Act or to the like effect (35). If the work is done between October 1st and April 1st the lien statement must be filed on or before April 20th, but if the work be done on or after April 1st and before October 1st the statement must be filed within 20 days after the last day upon which such labour or services were performed (36). The lien will remain effective against

(31) 61 Vict. (Man.) 1898, c. 50.

(32) 56 Vict. (Man.) 1893, c. 38, ss. 2, 3.

(33) 56 Vict. (Man.) 1893, c. 38, s. 3.

(34) 56 Vict. (Man.) c. 38, s. 4.

(35) 56 Vict. (Man.) c. 38, s. 5.

(36) 56 Vict. (Man.) c. 38, s. 6.

the logs or timber in whomsoever the possession of the same shall be found, notwithstanding a sale, mortgage or transfer, of the same made during the time limited for and previous to the filing, and afterwards during the time limited for the enforcement, for which a summary procedure is provided (37).

Woodman's Lien—Ontario.—The Ontario Woodman's Lien for Wages Act was passed in 1891 (38) and applies to the Districts of Muskoka, Parry Sound, Nipissing, Algoma, Thunder Bay and Rainy River and to the Provisional County of Haliburton (39).

By it any person performing any labour, service or services in connection with any logs or timber in the said Districts or Provisional County, shall have a lien thereon for the amount due for such labour, service or services, and the same shall be deemed a first lien or charge on such logs or timber, and shall have precedence of all other claims or liens thereon, except any lien or claim which the Crown may have upon the logs or timber for or in respect of any dues or charges, or which any timber slide company or owner of slides and booms may have thereon for or in respect of tolls (40).

Any contractor who has entered into any agreement under the terms of which he has cut, removed, taken out and driven, for any licensee of the Crown, by himself or by others in his employ, any logs or timber into the waters at or near Lake Superior, the Georgian Bay, Lake Huron or the Saint Mary River, for export in the log out of the Province of Ontario, shall be deemed to be a person performing labour,

(37) 56 Vict. (Man.) c. 38, s. 6 and 7.

(38) 57 Vict. (Ont.) c. 38, now R.S.O. 1897, c. 154.

(39) R.S.O. 1897, c. 154, s. 3.

(40) R.S.O. 1897, c. 154, s. 5 (1).

service or services upon logs or timber within the meaning of the section, and such cutting, removal, taking out and driving is to be deemed to be the performance of labour, service or services within the meaning of the section (41).

The lien shall not continue to be a charge on the logs or timber after the time within which the statement of claim provided for in the Act is required to be filed unless such statement, verified upon oath by the person claiming such lien or some one duly authorized on his behalf, shall be filed as is therein directed (42).

Such statement shall be in writing and, except in the cases for which a different provision is made by the statute, shall be filed in the office of the Clerk of the District Court of the Provisional Judicial District in which the labour or service or some part thereof has been performed (43).

Where such labor or services have been performed upon any logs or timber got out to be run down or which have been run down any of the rivers or streams flowing into the Georgian Bay, Lake Huron, Lake Superior, Lake of the Woods, Rainy Lake or Rainy River or Pigeon River, such statement may, at the option of the claimant, be filed in the office of the clerk of the District Court of the district in which the labour or service or some part thereof has been performed as aforesaid, or in the office of the Clerk of the District Court of the district wherein the drive terminates or reaches the waters of the said lakes, bays or rivers (44).

(41) R.S.O. 1897, c. 154, s. 5 (2).

(42) Sec. 6 (1).

(43) Sec. 6 (2).

(44) Sec. 6 (3).

Such statement shall set out briefly the nature of the debt, demand or claim, the amount due to the claimant as nearly as may be, over and above all legal set-offs or counter-claims, and a description of the logs or timber upon or against which the lien is claimed, and may be in the following form or to the like effect (45):—

STATEMENT OF CLAIM OF LIEN.

A. B., (*name of claimant*) of (*state residence of claimant*), (*if claim made as assignee then say as assignee of giving name and address of assignor*) under "The Woodman's Lien for Wages Act," claims a lien upon certain logs or timber of (*here state the name and residence of the owner of logs or timber upon which the lien is claimed if known*) upon the logs and timber composed of (*state the kinds of logs and timber such as pine sawlogs, cedar or other posts or railway ties, shingle bolts or staves, etc., also where situate at time of filing of statement*) in respect of the following work, that is to say, (*here give a short description of the work done for which the lien is claimed*) which work was done for (*here state the name and residence of the person upon whose credit the work was done*) between the
 day of and the day of
 at (per month or day as the case may be).

The amount claimed as due (*or to become due*) is the sum of

(*When credit has been given*).

The said work was done on credit, and the period of credit will expire on the day of

Dated at this day of A.D., —.

(*Signature of Claimant*).

AFFIDAVIT TO BE ATTACHED TO STATEMENT OF CLAIM.

I make oath and say that I have read (*or have heard read*) the foregoing statement of claim, and I say that the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me after giving credit for all sums of money, goods or merchandise to which the said (*naming the debtor*) is entitled to credit as against me.

Sworn before me at in the district }
 of this day of A.D., —. }

A Commissioner, etc.

In the case of any contractor coming within the terms of subsection 2 of section 5 of the Act the statement of claim shall be filed on or before the 1st day of September, next following the performing of the labour service or services to which such statement refers (46).

In other cases if such labour, service or services be performed between the 1st day of October and the 1st day of April next thereafter, the statement of claim shall be filed on or before the 20th day of April next thereafter, but if such labour, service or services be performed on or after the 1st day of April and before the 1st day of October in any year, then such statement shall be filed within twenty days after the last day such labour, service or services were performed (47).

No sale or transfer of the logs or timber upon which a lien is claimed under the Act during the time limited for the filing of such statement of claim and previous to the filing thereof, or after the filing thereof and during the time limited for the enforcement thereof, shall in any wise affect such lien but such lien shall remain and be in force against such logs and timber in whosoever possession the same shall be found (48).

Every agreement or bargain, verbal or written, express or implied, which may be made or entered into, on the part of any workman, servant, labourer, mechanic, or other person employed in any kind of manual labour intended to be dealt with in the Act, by which it is agreed that the Act shall not apply, or that the remedies provided by it shall not be available for the benefit of any person entering into such agree-

(46) Sec. 8 (1).

(47) Sec. 8 (2).

(48) R.S.O. 1897, c. 154, s. 9.

ment, is by the statute declared to be null and void and of no effect as against any such workman, servant, labourer, mechanic, or other person but with an exception however as to any foreman, manager, officer or other person whose wages are more than \$3 a day (49).

No payment of wages shall be made or offered to any person for any labour or services performed upon or in connection with any logs or timber, in the said districts and provisional county by any cheque, order, I.O.U., bill of exchange, promissory note, or other undertaking (other than a bank note or bill) drawn upon or payable at or within any place or locality not within the Province of Ontario (50).

No payment made or offered to be made in violation of this statutory provision will be allowed as a defence in any action or proceeding for the recovery of wages, or be receivable in evidence thereon, nor will any such payment or offer of payment in any way affect any claim of lien for labour or services on logs or timber under the Act, but in case of the sale, or transfer of such paper writing or instrument, in whole or in part, by the payee, the consideration received by him shall be held and treated as payment on account (51).

Any persons having a lien upon or against any logs or timber may enforce the same by suit, where the claim does not exceed \$200, in the Division Court within whose jurisdiction the logs or timber or any part thereof may be situated at the time of the commencement of the suit, or where the claim exceeds \$200, in the proper District Court where such statement of lien is filed; such suit may be commenced

(49) R.S.O. 1897, c. 154, s. 4.

(50) R.S.O. 1897, c. 154, s. 41.

(51) R.S.O. 1897, c. 154, s. 43.

to enforce the lien, if the same be due, immediately after the filing of such statement, or, if credit has been given, immediately after the expiry of the period of credit, and such lien claim will cease to be a lien upon the property named in such statement unless the proceedings to enforce the same be commenced within 30 days after the filing of the statement of claim or after the expiry of the period of credit. In all such suits the person, company or corporation liable for the payment of the debt or claim shall be made the party defendant (52).

There shall be attached to or endorsed upon the writ, or summons, a copy of the lien claim filed under the Act, and no other statement of claim shall be necessary unless ordered by the Court or Judge, and no pleadings or notices of dispute or defence, other than such as are required in a suit or proceeding in the Division Court, shall be necessary whether the suit be brought in the District Court or in the Division Court. In case no dispute is filed, judgment may be signed and execution issued according to the practice of the Division Court. The Court or Judge may order any particulars to be given or any proper or necessary amendments to be made, or may add or strike out the names of parties at any time and may set aside judgment and permit a defence or dispute to be entered or filed, on such terms as to him shall appear proper. The writ shall be in the form, as nearly as may be, of that in use in the court in which it is issued, but the practice thereafter shall follow as nearly as may be that of the Division Courts. Writs may be served anywhere in the Province in the same manner as in other cases, and the judgment shall declare that the same is for wages, the amount thereof

and costs, and that the plaintiff has a lien therefor on the property described when such is the case (53).

In any case, whether commenced by writ, or summons or attachment, and whether in a Division or District Court, the Judge may direct that the same shall be disposed of summarily by him in chambers without waiting for the regular sittings of the Court, upon such terms as to notice and otherwise as the order shall provide, and the same may be so heard and disposed of. The Judge may also entertain in chambers any application to set aside an attachment or seizure or to release logs that have been seized, and may summarily dispose of such application (54).

Special provisions are also made for the issue of a warrant or writ of attachment in certain cases for the seizure of the logs before judgment (55).

But it is also provided that no Sheriff or Bailiff shall seize upon or detain any logs or timber under the provisions of the Act when in transit from the place where cut to the place of destination when such place of destination is within any of the said districts in which proceedings have been commenced, but in case such logs or timber are so in transit or are in the possession of any booming company or other person or corporation for the purpose of being driven or sorted and delivered to the owners or to satisfy any statutory lien, then attachment of said logs or timber may be made by serving a copy of said attachment upon the person or corporation driving or holding the same, who shall from the time of such service be deemed to hold the same both on his or their own behalf and for the said sheriff or bailiff to the extent of the lien, until the logs or timber can be driven and

(53) R.S.O. 1897, c. 154, s. 11.

(54) R.S.O. 1897, c. 154, s. 15.

(55) Secs. 16, 17 and 18.

sorted out ; and when driven or sorted out, the sheriff or bailiff may receive the said logs or timber from such person or corporation, and the statutory lien of such person or corporation shall not be released by the holding of such sheriff or other officer (56).

A number of lien holders may join in taking these statutory proceedings, or may assign their claims to any one or more persons, but the statement of claim to be filed under section 6 of the Act shall include particular statements of the several claims of persons so joining, and shall be verified by the affidavits of the persons so joining, or separate statements of claim may be filed and verified in the manner provided by the statute, and one attachment issued on behalf of all the persons so joining (57).

The lien under the Ontario Woodman's Lien Act will accrue to the benefit of cooks, blacksmiths, artisans and all others usually employed in connection with the cutting, skidding, felling, hauling, scaling, banking, driving, running, rafting or booming any logs or timber (58), and the term 'logs or timber' used in the statute is declared to mean and include logs, timber, cedar posts, telegraph poles, railroad ties, tan-bark, shingle bolts, or staves, or any of them (59).

A special mode of procedure for the enforcement of the lien is created by the Act, but it is also provided that the same shall not disentitle any person to any other remedy to which he may be entitled for the recovery of any amount due in respect of labour, service or services performed upon or in connection with any logs or timber ; and where a suit is brought

(56) R.S.O. 1897, c. 154, s. 19.

(57) R.S.O. 1897, c. 154, s. 36.

(58) Sec. 2.

(59) Sec. 2 (1).

to enforce a lien, but no lien shall be found to exist in respect of the claim, judgment may be directed for the amount due as in an ordinary action (60).

Woodman's lien Quebec.—In the Province of Quebec every person engaging himself to cut or manufacture timber or to draw it out of the forest, or to float, raft or bring it down rivers and streams has, for securing his wages or salary, a privilege ranking with the claims of creditors who have a right of pledge or of retention, upon all the timber belonging to the person for whom he worked, and if he worked for a contractor, sub-contractor or foreman, upon all the timber belonging to the person in whose service such contractor, sub-contractor or foreman was, and which was cut down or floated by such contractor, sub-contractor or foreman; but such privilege is extinguished as soon as the lumber shall have passed into the hands of a third person who has bought it, has received delivery thereof, and has paid the price therefor in full (61). Such privilege in no wise affects that which a bank may acquire in virtue of the Bank Act, Canada (1890) (62) which permits a Canadian chartered bank to acquire and hold any warehouse receipt or bill of lading as collateral security for the payment of any debt incurred in its favour in the course of its banking business; and which enacts that the warehouse receipt or bill of lading so acquired shall vest in the bank, from the date of the acquisition thereof, all the right and title of the previous holder or owner thereof, or of the person from whom the goods and wares and merchandise were received or acquired by the bank, if the

(60) R.S.O. 1897, c. 154, s. 35.

(61) Quebec C.C. art. 1994 (c); 57 Vict. (Que.) 1894, c. 47, s. 1.

(62) 53 Vict. (Can.), c. 31, s. 73.

warehouse receipt or bill of lading is made directly in favour of the bank instead of to the previous holder or owner of such goods, wares and merchandise.

The expression "goods, wares and merchandise" as used in the Bank Act of Canada includes timber, deals, boards, staves, sawlogs, and other lumber (63), and the expression "warehouse receipt" means any receipt given by any person for any goods, wares or merchandise in his actual visible and continued possession as bailee thereof in good faith and not as of his own property, and includes receipts given by any person who is the owner or keeper of a harbour, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods, wares or merchandise, for goods, wares and merchandise delivered to him as bailee, and actually in the place or in one or more of the places owned or kept by him, whether such person is engaged in other business or not (64).

The Bank Act of Canada also allows Canadian chartered Banks to take a "security" in a statutory form, commonly called a warehouse receipt, under which the borrower, if a wholesale manufacturer or a wholesale purchaser or shipper of forest products (*inter alia*), may pledge such products for a money advance although retaining them in his own possession (65). If, however, the woodman's lien above provided for is one in which the claimant has worked for a contractor or sub-contractor, such privilege shall not exist unless the person having a right thereto has given a written notice (66) to the person affected by the exercise thereof and to the debtor or their

(63) 53 Vict. (Can.), c. 31, s. 2 (c).

(64) 53 Vict. (Can.), c. 31, s. 2 (d).

(65) 53 Vict. (Can.), c. 31, s. 74; *Tennant v. Union Bank of Canada* (1894) A.C. 31.

(66) 62 Vict. (Que.) 1899, c. 50, s. 1.

agents or employees, of the amount due to him at each term of payment as soon as possible. Such notice may be given by one creditor for and in the name of all the others who are unpaid. In the event of a contestation between the creditor and the debtor respecting the amount due, the creditor shall without delay give written notice to the person affected by the exercise of such right, and the latter shall then retain the amount in dispute until he receives a written notification of an amicable settlement or of a judicial decision (67).

Lien for timber dues -British Columbia.—By the 'Land Act' of British Columbia being the consolidated Act respecting Crown Lands in that Province (68), there is reserved to and for the use of Her Majesty, her heirs and successors a royalty of 50 cents per thousand feet board measure upon and in respect of all timber suitable for spars, piles, sawlogs, or railroad ties, props for mining purposes, shingle or other bolts of cedar, fir or spruce; and a royalty of 25 cents for every cord of other wood cut upon Crown lands, patented lands, timber leaseholds or timber limits, and upon any lands which may be granted after the passing of the Act (69). An exception is made, however, of cordwood cut for personal use for fuel for domestic purposes, and not for sale (70.)

The measurement of piles shall for the purposes of the Act be by the running foot, and, of railway ties and props, by the cord; and 200 running feet of piles or one cord of ties or props shall for that purpose be taken as equal to 1,000 feet board measure (71). The

(67) Quebec C.C. art. 1994 (') as amended 62 Vict. (Que.) 1899, c. 50, s. 1.

(68) R.S.B.C. 1897, c. 113.

(69) Stat. B.C. 1896, c. 28, s. 2; R.S.B.C. 1897, c. 113, s. 58.

(70) R.S.B.C., c. 113, s. 63.

(71) Sec. 58.

statute declares further that all timber or wood upon which a royalty is reserved, or which has been cut upon timber leaseholds, shall be liable for the payment of the royalty (and in the case of leaseholds, for the rent), so long as and wheresoever the timber or any part of it may be found in British Columbia, *whether in the original logs or manufactured* into deals boards or other stuffs; and in case any such timber or wood has been made up with other timber or wood into a crib, dam, or raft, or in any other manner has been so mixed up as to render it impossible or difficult to distinguish the timber liable to the payment of royalty or rent from timber not so liable, such other timber shall also be liable for all royalty and rent imposed by the Act, and all officers and agents entrusted with the collection of the royalty or rent may follow all such timber, or any timber with which it is so mixed, and seize and detain the same wherever it is found until such royalties and rent, and the reasonable costs and expenses of seizure and detention, are paid or secured (72).

The statute also provides that the Crown shall have a lien upon all steamships, railway and stationary engines, smelters, concentrators and all furnaces or machinery in or for which any timber or wood upon which a royalty is reserved or payable in any way or manner, or for any purpose has been or is being used or consumed (73), and also upon all steamships, tow-boats, scows or other vessels, and upon all railway trains, teams and waggons in any way engaged in transporting such timber (74). This extended lien confers the same rights and is enforceable in the same

(72) R.S.B.C. 1897, c. 113, s. 59.

(73) Sec. 60.

(74) Sec. 60.

manner as the lien and rights of recovery of royalties conferred by the statute (75).

A millowner may be authorized by the Chief Commissioner of Lands and Works, B.C., to collect the royalties due to the Crown upon any logs which may be brought to his mill and to give receipts therefor (76); but for all moneys so received the Crown will have a lien upon the mill and *all timber thereat*, and on any lands or waters appurtenant thereto (77).

Lien for timber dues—Ontario.—By the Ontario Crown Timber Act (78) it is enacted as follows:—

"All timber cut under licenses shall be liable for the payment of the Crown dues thereon, with interest thereon and expenses, so long as and wheresoever the timber or any part of it may be found in Ontario, whether in the original logs or manufactured into deals, boards or other stuff; and when any license holder is in default for, or has evaded the payment of dues to the Crown on any part of his timber or saw logs, such dues interest and expenses may be levied on any other timber or saw logs, or their manufactured product, belonging to such defaulter, cut under license, together with the dues thereon, and interest and expenses incurred; and all officers or agents entrusted with the collection of such dues may follow all timber and seize and detain the same wherever it is found until the dues, interest and expenses are paid or secured" (79).

Bonds or promissory notes taken for the Crown dues either before or after the cutting of the timber,

(75) R.S.B.C. 1897, c. 113, s. 60; Stat. B.C. 1897, c. 19, s. 4.

(76) R.S.B.C. c. 113, s. 62.

(77) Sec. 62.

(78) R.S.O. 1897, c. 32.

(79) R.S.O. 1897, c. 32, s. 16.

as collateral security, or to facilitate collection, shall not in any way affect the lien of the Crown on the timber, but the lien shall subsist until the dues are actually discharged (80).

If timber so seized and detained for non-payment of Crown dues remains more than two months in the custody of the agent or person appointed to guard the same, without the dues and expenses being paid, the Commissioner of Crown Lands, with the previous special sanction of the Lieutenant-Governor in Council, may order a sale of the timber to be made after sufficient notice; and the balance of the proceeds of the sale, after retaining the amount of dues and costs incurred, shall be handed over to the owner or claimant of the timber (81).

Whenever timber is seized for non-payment of Crown dues, or for any other cause of forfeiture, or any prosecution is brought for any penalty or forfeiture under the Act, and a question arises whether such dues have been paid on the timber, or whether the timber was cut on other than the Public Lands, the burden of proving payment, or on what land the timber was cut, shall lie on the owner or claimant of the timber and not on the officer, who seizes the same, or the party bringing the prosecution (82).

The alleged owner or the claimant of timber seized for non-payment of dues payable to the Crown may obtain from the court an order for its delivery up to him, on giving security in double the value of the timber as provided by the Crown Timber Act (83). The lien of the Crown will take priority over any lien

(80) Sec. 17.

(81) Sec. 18.

(82) R.S.O. 1897, c. 32, s. 23.

(83) R.S.O. 1897, c. 32, secs. 24, 25.

for clearing an obstruction, etc., under the Saw Logs Driving Act (84).

By Sec. 4 of chapter 23 of the Consolidated Statutes of Canada (1859), which is still in force in Ontario, it was enacted that :—

"All timber cut under licenses shall be liable for the payment of the Crown dues thereon, so long as and wheresoever the said timber or any part of it may be found, whether in the original logs or manufactured into deals, boards or other stuff,—and all officers or agents entrusted with the collection of such dues may follow all such timber and seize and detain the same wherever it is found until the dues are paid or secured."

Lien for Tolls—Ontario.—The right to use river improvements constructed by individuals for floating down timber and rafts is controlled in Ontario by the Rivers and Streams Act (85), which provides that in case any person shall construct in or upon a river, creek or stream, any apron, dam, slide, gate, lock, boom or other work necessary to facilitate the floating or transmission of sawlogs or other timber, rafts or crafts down such river, creek or stream, which was not navigable or floatable before the improvements were made, or shall blast rocks or remove shoals or other impediments, or otherwise improve the floatability of the river, creek or stream, such person shall not have the exclusive right to the use of the river, creek or stream, or to the constructions and improvements; but all persons shall have during the spring, summer and autumn freshets, the right to float and transmit saw-logs and other timber, rafts and crafts, down such rivers, creeks or streams, and through and

(84) R.S.O. 1897, c. 143, s. 15.

(85) R.S.O. 1897, c. 142.

over the constructions and improvements, doing no unnecessary damage to the constructions and improvements, or to the banks of the said rivers, creeks or streams, subject to the payment to the person who has made the constructions and improvements of reasonable tolls (86).

The owner of the improvements or any person desiring to use the same may apply under the Act to a County Court Judge to fix a tariff of tolls therefor, unless already fixed by charter or statute (87). And by section 19 of the same Act, every person entitled to tolls thereunder shall have a lien upon the saw-logs or other timber passing through or over such constructions or improvements for the amount of the tolls, such lien to rank next after the lien (if any) which the Crown has for dues in respect to such logs or timber, and if the tolls are not paid, any Justice of the Peace having jurisdiction within or adjoining the locality in which the constructions or improvements are, shall, upon the oath of the owner of the constructions or improvements, or upon the oath of his agent, that the just tolls have not been paid, issue a warrant for the seizure of such logs or timber, or so much thereof as will be sufficient to satisfy the tolls, which warrant shall be directed to any constable, or any person sworn in as a special constable for that purpose, at the discretion of the magistrate, and shall authorize the person to whom it is directed, if the tolls are not paid within fourteen days from the date thereof, to sell, subject to the lien of the Crown (if any) for dues, the said logs or timber, and out of the proceeds to pay such tolls, together with the cost of the warrant and sale, rendering the surplus on demand to the owner; provided always, that the

(86) Sec. 11.

(87) R.S.O. 1897, c. 142, s. 13.

authority to issue such warrant by such Justice of the Peace shall not exist after the expiration of one month from the time of the passage of the logs or timber through or over any of such constructions or improvements.

The lien for tolls has priority over any lien for expenses of clearing a 'jam' or separating intermixed logs given by The Saw Logs Driving Act (88).

Lien for expense of breaking 'jams' Ontario.

Another statutory lien in Ontario with respect to saw logs, is that provided by the Saw Logs Driving Act (89), in respect of the expense of clearing the obstruction on the occurrence of a "jam."

The word "logs" is, by the interpretation clause of the statute, declared to include "saw logs, timber, posts, ties, cordwood and other things being parts of trees"; and the word "water" shall "mean and include lakes, rivers, creeks and streams in this Province" (90). The statute enacts that any person putting or causing to be put, into any water, logs, for the purpose of floating the same in, upon or down such water, shall make adequate provisions and put on a sufficient force of men to break, and shall make all reasonable endeavours to break, jams of such logs and clear the same from the banks and shores of such water with reasonable despatch, and run and drive the same so as not to unnecessarily delay or hinder the removal, floating, running or driving of other logs, or unnecessarily obstruct the floating or navigation of such water (91). In case of the neglect of any person to comply with these provisions any other person desiring

(88) R.S.O. 1897, c. 143, s. 14.

(89) R.S.O. 1897, c. 143.

(90) R.S.O. 1897, c. 143, s. 2.

(91) R.S.O. 1897, c. 143, s. 3.

to float, run or drive logs in, upon or down such water, and whose logs would be thereby obstructed, may cause such jams to be broken and the logs to be cleared from the banks and shores of such water, and to be floated, run and driven in, upon and down such water (92).

The person causing such jams to be broken, or such logs to be cleared, floated, run or driven, must do the same with reasonable economy and despatch, and take reasonable care not to leave logs on the banks or shores, and will have a lien upon the logs in the jam, or so cleared, floated, run or driven, for the reasonable charges and expense of breaking the jams and the clearing, floating, running, driving, booming and keeping possession of such logs, and may take and *keep possession* of such logs, or so much thereof as may be reasonably necessary to satisfy the amount of such charges and expenses pending the decision by arbitration as provided by the Act. The person taking possession is to use all reasonable care not to take such logs beyond the place of their original destination, if known, but may securely boom and keep possession of the same at or above such place. The owner or person controlling such logs, if known, shall be forthwith notified of their whereabouts, and if satisfactory security be given for the amount of such charges and expenses, possession of the logs must be given up to him (93).

When a person floating logs down a stream fails to break jams of such logs, as directed by section 3 of The Saw-Logs Driving Act, another person whose logs are obstructed by the jam is not limited to the remedy given by the Act, of breaking the jam at the expense of the person whose logs have formed it, but

(92) R.S.O. 1897, c. 143, s. 4.

(93) R.S.O. 1897, c. 143, s. 5.

may claim, in an arbitration instituted under section 17 of the Act, damages for the unreasonable obstruction of the floating of the logs (94).

Clearing intermixed logs—Lien in Ontario.—By the same Act a lien is declared upon logs owned or controlled by persons through whose neglect other logs have become so intermixed that they cannot be conveniently separated until driven further down stream. The statute provides that when logs of any person upon or in any water or the banks or shores of such water, are so intermixed with logs of another person or persons, that the same cannot be conveniently separated for the purpose of being floated in upon or down such water, then the several persons owning or controlling the intermixed logs, shall respectively make adequate provisions and put on a fair proportion of the men required to break jams of such intermixed logs, and to clear the same from the banks and shores of such water with reasonable despatch, and to float, run and drive the same in upon and down such water; and the costs and expenses thereof shall be borne by the parties in such proportions as they may agree upon, and in default of agreement as may be determined by arbitration as provided in the Act (95). In case of neglect of any person to comply with these provisions, any other person whose logs are intermixed, may put on a sufficient number of men to supply the deficiency and break jams of such intermixed logs, and to clear the same from the banks and shores of such water, and to float, run and drive all

(94) *Cockburn v. Imperial Lumber Co.* Sup. Ct. of Canada, October 1899, reversing 26 Ont. App. 19, and affirming judgment of Rose, J., 26 Ont. App. 20.

(95) R.S.O. 1897, c. 143, s. 6.

such intermixed logs in, upon and down such water (96).

The person supplying such deficiency and causing such jams to be broken, or such intermixed logs to be cleared, floated, run or driven, must do the same with reasonable economy and despatch, and must take reasonable care not to leave logs on the banks or shores, and *shall have a lien* upon the logs owned or controlled by the person guilty of such neglect, for a fair proportion of the charges and expenses of breaking the jams, and the clearing, floating, running, driving, booming and keeping possession of such intermixed logs; and may take and keep possession of such logs, or so much thereof, as may be reasonably necessary to satisfy the amount of such fair proportion of charges and expenses pending the decision by arbitration.

The person so taking possession of logs is required to use all reasonable care not to take them beyond the place of their original destination, if known, but may securely boom and keep possession of the same at or above such place.

The owner or person controlling such logs, if known, must be forthwith notified of their whereabouts, and if satisfactory security be given for the amount of such proportion of charges and expenses, possession of the logs must be given up (97).

Ontario—Separating intermixed logs.—By The Saw Logs Driving Act (98), when logs of any person, upon or in any water, or the banks or shores of such water, are intermixed with logs of another person, then any of the persons whose logs are intermixed,

(96) R.S.O. 1897, c. 143, s. 7.

(97) R.S.O. 1897, c. 143, s. 8.

(98) R.S.O. 1897, c. 143.

may at any time during the drive, require his logs to be separated from the other logs at some suitable and convenient place, and after such separation he shall secure the same at his own cost and expense, in such manner as to allow free passage for such other logs; provided that when any logs so intermixed reach their place of original destination, if known, the same shall be separated from the other logs, and after such separation the owner shall secure the same at his own cost and expense (99).

The several persons owning or controlling the intermixed logs shall respectively make adequate provisions and put on a fair proportion of the men required to make the separation; the cost and expense of such separation shall be borne by the parties in such proportions as they may agree upon, and in default of agreement, as may be determined by arbitration under the Act (100).

In case of neglect of any person to comply with these provisions any other person, whose logs are intermixed, is, by the statute, authorized to put on a sufficient number of men to supply the deficiency, and the logs owned by or controlled by the person guilty of such neglect *shall be subject to a lien* in favor of the person supplying the deficiency, for a fair proportion of the charges and expenses of making the separation, and for the reasonable charges and expenses of booming and keeping possession, and such person may take and keep possession of such logs or so much thereof as may be reasonably necessary to satisfy the amount of such fair proportion of charges and expenses pending the decision by arbitration in the manner provided by the Act.

(99) Sec. 9.

(100) Sec. 10.

The person so taking possession of logs must use all reasonable care not to take such logs beyond the place of their original destination, if known, but may securely boom and keep possession of the same at or above such place; and the owner or person controlling such logs, if known, is to be forthwith notified of their whereabouts, and if satisfactory security be given for the amount of such proportion of charges and expenses, possession of the logs shall be given up (101).

Timber drivers—New Brunswick.—By the Consolidated Act respecting Timber Drivers (102) it is enacted that the timber drivers, when called upon by any person interested, shall proceed to the river and take charge of the timber drive, determine the number of hands, rigging and implements required for the work, and apportion the number of men and materials to be furnished by each owner. If any owner does not within two days after written notice from the timber driver furnish such men and materials, they shall be provided by the driver, who shall hold the drive and *have a lien thereon* for all expenses, together with his own fees (103). If the same be not paid within 60 days after arriving at the rafting ground or market, the driver may sell the drive or any part thereof for the payment of the expenses and fees, first giving the owner notice if in the Province, and advertising the same for 30 days in three or more public places of the parish where the property may be (104).

(101) R.S.O. 1897, c. 143, s. 11.

(102) Con. Stat. N.B., 1877, c. 109.

(103) Con. Stat. N.B., c. 109, s. 1.

(104) Con. Stat. N.B. 1877, c. 109, s. 1.

CHAPTER XIII.

LIEN OF INNKEEPERS AND BOARDING HOUSE KEEPERS.

Innkeeper's lien. — An "inn" is a "house the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received" (1). An innkeeper, or keeper of a house providing general accommodation for wayfarers, whether or not it be known by the name of an inn or hotel, has a general lien on the goods of his guests (2).

If the innkeeper receives a person as a traveller who is not really a traveller, he has the same rights against him, and the same liabilities to him as if he were a traveller, but he is not liable for refusing to receive a person who is not travelling (3). If he receives goods that he is not bound to receive, he is entitled to the same rights and is subject to the same liabilities respecting them as if he had received them being bound to do so (4).

If the relation of guest is changed to that of a boarder, or if a person comes to the inn, not as a traveller but as a boarder, in such case the innkeeper has no other rights or liabilities with respect to the goods of such a person than a boarding house keeper

(1) *Thompson v. Lacy*, 3 B. & Ald. 283.

(2) *Thompson v. Lacy*, 3 B. & Ald. 283.

(3) *Newcombe v. Anderson* (1886), 11 Ont. R. 665, 672; *Walling v. Potter*, 35 Conn. 183.

(4) *Threfall v. Borwick*, L.R. 10 Q.B. 210.

would have, and would not be liable for their safe-keeping (5) except where by statute it is provided otherwise.

It is a question of fact as to whether the relation is that of innkeeper and guest or of boarding house keeper and boarder (6); the relation does not depend upon the fact of the price to be paid being more or less than the usual price; nor does a traveller, who enters an inn as a guest, cease to be guest by proposing to remain a given number of days, nor by ascertaining the price that will be charged for his entertainment, nor by paying in advance for a part or the whole of his entertainment (7). In Ontario it is declared by statute that an innkeeper has a lien on the baggage and property of his guest for the value or price of any "food or accommodation" furnished to the guest; and, in addition to all other remedies provided by law, the innkeeper is by the statute authorized, if the same remains unpaid for three months, to sell such baggage and property, after publishing the notice prescribed by the Act respecting Innkeepers (8). A tavernkeeper is, however, forbidden to keep the wearing apparel of any "servant or labourer" in pledge for any expenses incurred to a greater amount than \$6; and on payment or tender of such sum or any less amount due, such wearing apparel must be immediately given up, whatever be the amount due by such servant or labourer (9).

Under the Ontario statute the innkeeper has now what he had not at common law, i.e., a lien upon the

(5) *Newcombe v. Anderson*, 11 Ont. R. 665, 673.

(6) *Hall v. Pike*, 100 Mass. 495.

(7) *Berkshire v. Moody*, 7 Cush. (Mass.) 417; *Pinkerton v. Woodward*, 33 Cal. 557.

(8) R.S.O. c. 187.

(9) R.S.O. 1897, c. 157, s. 6.

goods of a person received by him into his house *as a boarder*; and upon the goods of a person who, being in his house as a guest, has changed his relation to that of a boarder; but it does not confer a lien in such case upon baggage and property brought by the boarder to the inn but belonging in fact to a third person (10).

The words "for the value or price of any food or accommodation furnished to such guest, boarder or lodger" contained in section 2 of the Ontario Innkeepers' Act (11), do not restrict the lien to charges for the board, etc., of the guest personally, but will include also the board and lodging of his servants and the keep of his horses. The intention of the Act was to increase, not to diminish, the rights of a landlord (12).

Extent of lien. An innkeeper must receive a traveller and his goods and is not bound to enquire whether or not the goods belong to his guest. He has a general lien upon all goods brought to the inn by a guest as his goods, or sent to the guest whilst staying at the inn and received by the innkeeper as the goods of the guest; and it makes no difference whether the goods do or do not belong to the guest, or whether the innkeeper knew to whom they belonged or not (13). So where a commercial traveller stayed at a hotel and incurred liabilities for board and lodging, and while he was there his employers sent him several lots of sewing machines for sale, it was held that the hotelkeeper had a lien upon the machines notwithstanding that before the liability was incurred the

(10) *Newcombe v. Anderson* (1886), 11 Ont. R. 665, 682.

(11) R.S.O. 1897, c. 187.

(12) *Huffman v. Walterhouse* (1890), 19 Ont. R. 186.

(13) *Robins v. Gray* (1895) 2 Q.B. 501.

employers had given notice to him that the machines belonged to them and not to the traveller (14).

But, if the chattel is not received as the guest's luggage but only to be used by him while he stayed at the hotel, the law relating to innkeepers would not apply. And where a piano was lent to a guest while he remained at the hotel and the hotelkeeper knew to whom the piano belonged, it was held that there was no right of detention or lien (15). Where, however, a person hired a piano and took it with other effects to an hotel where it was used by the hirer and his family, and the hotelkeeper did not know but that the guest owned the piano, he was held entitled to detain it as against the true owner (16).

At common law an innkeeper had a lien on horses the property of his guest or which had been brought to his inn by a guest (17).

An innkeeper has a lien on whatever goods he would be answerable for in case of loss (18). The lien is a general one on the horses and carriages and guest's goods conjointly for the whole amount of his bill; he is not restricted to a lien on the horses for the charges in respect of the horses, but has a lien on the horses for the guest's reasonable expenses (19).

Where a man and his wife stay together at a hotel and the husband only is charged with the bill, the lien will nevertheless attach to goods which are the separate property of the wife (20).

(14) *Robins v. Gray* (1895) 2 Q.B. 501.

(15) *Broadwood v. Granara* 10 Ex. 417.

(16) *Threfall v. Borwick* L.R. 10 Q.B. 210.

(17) *Allen v. Smith* 12 C.B.N.S. 638; *Mulliner v. Florence* 3 Q.B.D. 484.

(18) *Threfall v. Borwick* L.R. 10 Q.B. 210.

(19) *Huffman v. Walterhouse* (1890) 19 Ont. R. 186.

(20) *Gordon v. Silber* 25 Q.B.D. 491.

An innkeeper has no authority, however, to detain the person of his guest or any of the clothes the guest is actually wearing (21).

Lien of boarding house keeper.—At common law neither a boarding house keeper nor a lodging house keeper had any lien upon the goods of his boarder or lodger for the board and lodging (22). The right of lien is, however, conferred in Ontario by a statute (23), which enacts that the keeper of a boarding house or lodging house shall have a lien on the baggage and property of a boarder or lodger for his charges; and, in addition to all other remedies provided by law, he is empowered, in case the same remains unpaid for three months, to sell the goods on one week's notice published in accordance with the 'Innkeeper's Act' (24). He also has a lien upon a horse or other animal for the keep of same, and a power of sale on two weeks' notice by advertisement (25).

A person who boards for remuneration a relative or friend, but who is in no sense making a business of keeping a boarding house, is not a boarding house keeper within the Ontario statute conferring a lien on the boarder's effects (26).

The object of the statute is to afford a remedy to the keepers of boarding houses and lodging houses, who at common law had no lien, by giving to them a lien on the baggage and property of the boarder or

(21) *Sunbolf v. Axford* 3 M. & W. 248.

(22) *Newcombe v. Anderson* (1886) 11 Ont. R. 665.

(23) R.S.O. 1897, c. 187.

(24) R.S.O. 1897, c. 187.

(25) R.S.O. 1897, c. 187, s. 2 (2).

(26) R.S.O. 1897, c. 187; *Rees v. McKeown* (1882) 7 Ont. App.

lodger; but the statute does not, by its words or by necessary inference, give any lien upon baggage and property brought to the house by the boarder but belonging in part to third persons (27)

A boarding house keeper is forbidden to keep the wearing apparel of any "servant or labourer" in pledge for any expenses incurred to a greater amount than \$6 (28).

Ordinarily the goods of a sub-tenant are liable to seizure in respect of rent due by his landlord to a superior landlord (29); but a boarder or lodger whose goods are seized under a distress against the keeper of the boarding house may serve the bailiff with a statutory declaration made under The Canada Evidence Act of 1893 with an inventory annexed thereto subscribed by the boarder or lodger stating:

(a) That the immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels, so distrained, or in case a distress has been authorized but not effected, the goods threatened to be distrained upon;

(b) That such goods are the property or in the lawful possession of such boarder or lodger; and

(c) That nothing (or if anything the amount) by way of rent, board or otherwise, is due from the boarder or lodger to the immediate tenant by whom the rent distrained for is due.

On service of such a statutory declaration and on payment of the amount if any due from the boarder or lodger to the immediate tenant the superior landlord is bound to release the lodger's goods (30).

(27) *Newcombe v. Anderson* (1886) 11 Ont. R. 665.

(28) R.S.O. 1897, c. 157, s. 6.

(29) R.S.O. 1897, c. 170, s. 31 (3).

(30) R.S.O. 1897, c. 170, s. 39, 40.

Any sum so paid by a lodger is a valid payment on account of the amount due from him to the immediate tenant (31).

Enforcement of lien.—An hotelkeeper who locks up the room of a guest containing the latter's baggage and effects for non-payment of charges for board and lodging, and who notifies the guest thereof and requires him to leave the hotel on the same day or pay the bill, thereby places the guest's baggage under lawful seizure and detention in respect of the landlord's common law lien; and the taking away of such baggage by the guest without the landlord's authority is theft under sec. 306 of the Criminal Code of Canada (32).

A person retaining goods under a lien for board must take reasonable care of them, and when the boarder has assisted to place the trunk in a public room of a hotel but had not requested it to be placed there, and it was afterwards broken into and some of the contents lost, it was held that he had not accepted the risk incurred by the trunk being so kept, and that the hotelkeeper was liable for not having taken reasonable care of it (33). In such a case the mere fact of the trunk having been broken while it was held under the lien is evidence of negligence (34). Under special circumstances, such as the property on which the lien attaches involving considerable expense to keep, the innkeeper may have a right to use the property to pay the current charges of keeping it. So

(31) R.S.O. 1897, c. 170, s. 41.

(32) *The Queen v. Hollingsworth* (1899) 2 Can. Cr. Cas. 291, per Rouleau J. (N.W.T.).

(33) *Frank v. Berryman* (1894) 3 B.C.R. 506.

(34) *Dawson v. Cholmeley* 13 L.J.Q.B. 33; *Frank v. Berryman* (1894) 3 B.C.R. 506.

where a horse and waggon were left with an innkeeper to be kept for a few days, and, the guest not returning for same, the innkeeper had reason to believe that the horse and waggon was not owned by the party who brought it and that he would not return, and the innkeeper did not know where to find either the party who brought them or the true owner, it was held that he had the right to use the property moderately and prudently to the extent of compensating him for his charges for keeping, and that such use was not a conversion (35).

British Columbia—Liens of innkeepers and boarding house keepers.—By the "Innkeepers' Act" of British Columbia (36) it is declared that every 'innkeeper', including in that term the keeper of an hotel, inn, tavern, public house, or other place of refreshment who before the Act would have been responsible for the goods and property of his guests (37), and every boarding house keeper, shall have a lien on the baggage and property of his guest, boarder or lodger for the value or price of any food or accommodation not being money or intoxicating liquors (38) furnished to such guests, boarder or lodger, and, in addition to all other remedies provided by law, shall have the right, in case the same remains unpaid for 12 months, to sell by public auction the baggage and property of such guest, boarder or lodger, on giving *one week's notice* by advertisement in a newspaper published in the electoral district in which such inn, boarding house, or lodging house is situated (or, in case there is no newspaper published in such electoral district, in

(35) *Alvord v. Davenport* 43 Vt. 30.

(36) R.S.B.C. 1897, c. 98.

(37) Sec. 2.

(38) Sec. 2 (3).

a newspaper published nearest to such inn, boarding house, or lodging house), of such intended sale stating (39) :—

- (a) The name of the guest, boarder or lodger ;
- (b) The amount of his indebtedness ;
- (c) A description of the baggage or other property to be sold ;
- (d) The time and place of sale ; and
- (e) The name of the auctioneer.

After such sale the innkeeper, boarding house keeper, or lodging house keeper may apply the proceeds of the sale in payment of the amount due to him, and the costs of such advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto, on application being made by him therefor (40). If an innkeeper refuses to receive goods from his guest on deposit for safe custody, or if the guest through any default of the innkeeper is unable to deposit his goods or property for safe keeping with the innkeeper, the latter will not be entitled to the benefit of the Innkeepers' Act in respect of such goods or property (41) ; the innkeeper may, however, if he sees fit to do, require that upon goods being deposited by the guest, that the same shall be deposited in a box or other receptacle fastened and sealed by the person depositing the same (42).

Manitoba — Liens of innkeepers and boarding house keepers.—The keeper of any hotel, inn, tavern, public house or place of refreshment the keeper of which is by law responsible for the goods and property of his guests is declared to be an innkeeper within the

(39) R.S.B.C. 1897, c. 98, s. 3.

(40) Sec. 3.

(41) Sec. 5.

(42) R.S.B.C. 1897, c. 98, s. 4.

meaning of the Manitoba 'Innkeepers' Act' (43); and is declared to have a lien on the baggage and property of his guest for the value or price of any food or accommodation furnished to the latter other than wines or spirituous or fermented liquors (44).

A boarding house keeper, under which designation the keeper of a lodging house is also included (45), is given a similar right of lien on the baggage and property of his boarder or lodger (46).

The statute provides that any innkeeper or boarding house keeper in Manitoba may detain in his inn or boarding house, and before the same shall have been removed out of the inn or boarding house but not afterwards, the baggage and personal effects of any person who is indebted to him for board or lodging other than the price of wines or spirituous or fermented liquors supplied to the guest, boarder or lodger or to any one by his order (47). The innkeeper or boarding house keeper must keep in his possession, and will be held responsible for, any trunks and their contents and personal effects detained by him for the full period during which he exercises this right, unless they shall be sooner released (48).

If the owner does not claim and release any things so detained, then, in case the charges shall remain unpaid for three months, the innkeeper or boarding-house keeper is given, in addition to all other remedies provided by law, the right to sell by public auction the baggage and property of such

(43) R.S.M. 1891, c. 73, s. 2 (a).

(44) R.S.M. 1891, c. 73, s. 3 and 7.

(45) Sec. 2 (d).

(46) Sec. 3.

(47) Secs. 4 and 7.

(48) R.S.M. 1891, c. 73, s. 5.

guest, boarder or lodger, on posting up and keeping posted during the period of one week on the outside of the door of such inn or boarding house a notice of such intended sale, stating (49) :—

- (a) The name of the guest, boarder or lodger ;
- (b) The amount of his indebtedness ;
- (c) A description of the baggage or other property to be sold ;
- (d) The time and place of sale, and
- (e) The name of the auctioneer.

After such sale the proceeds are to be applied in payment of the amount due the innkeeper or boarding house keeper and the costs of such advertising and sale, and the surplus, if any, he must pay to the person entitled thereto, on application being made therefor (50). If application for such surplus be not made forthwith, the innkeeper or boarding house keeper shall immediately pay the same to the Clerk of the County Court of the Judicial Division in which the inn or boarding house is situated, to be kept by such Clerk for such owner for one year, after which time, if the owner does not make a claim, such surplus shall be paid over to the Provincial Treasurer of Manitoba, and form part of the Consolidated Revenue Fund of the province (51). To entitle an *innkeeper* to the benefits of the statute, he must keep conspicuously posted in the office and public rooms and in every bedroom in his inn a copy of the Act, Revised Statutes of Manitoba, Cap. 73, and the benefits of the Act can be claimed by him only in respect of such goods or property as shall have been

(49) R.S.M. 1891, c. 73, s. 6.

(50) Sec. 6.

(51) R.S.M. 1891, c. 73, s. 6.

brought to his inn while such copy shall be so posted (52). There is, however, no corresponding provision as regards boarding house keepers and lodging house keepers. So also if an innkeeper refuse to receive from his guest goods on deposit for safe custody in the manner specified by the Innkeepers' Act, or if the guest be unable through the innkeeper's default to deposit such goods or property, the innkeeper will not be entitled to the benefit of the Act in respect of such goods or property (53).

North-West Territories—Liens of innkeepers and boarding house keepers.—By "The Hotelkeepers' Ordinance" (54), any hotel, boarding or lodging house keeper may seize and detain in his hotel, house, or on his premises, and before the same shall have been removed therefrom, the trunks and personal property of any person who is indebted to him *for board and lodging*, and shall be responsible for the safe keeping of the same (55). But so far as the claim is for the price of wines or spirituous or fermented liquors supplied to the guest or to anyone else by his order, the right of lien is expressly excluded by the Ordinance (56).

In addition to all remedies provided by law, he shall have the right, in case the charges remain unpaid for three months after the seizure thereof, to sell by public auction the baggage and property of the guest, boarder or lodger, so seized, on posting and keeping posted during the period of one week, on the outside

(52) R.S.M. 1891, c. 73, s. 8.

(53) R.S.M. 1891, c. 73, s. 10.

(54) Con. Ord. N.W.T. 1898, c. 56.

(55) Sec. 2.

(56) Con. Ord. N.W.T. 1898, c. 56, s. 3.

of the door of such hotel, boarding or lodging house, a notice of such intended sale stating (57) :

- (a) The name of the guest, boarder or lodger ;
- (b) The amount of his indebtedness ;
- (c) A description of the baggage or other property to be sold ;
- (d) The time and place of sale ; and
- (e) The name of the auctioneer.

After such sale, the innkeeper, or boarding or lodging house keeper, may apply the proceeds of such sale in payment of the amount due to him for board and lodging, and the costs of such advertising and sale ; and he shall pay over the surplus, if any, to the person entitled thereto, on application being made therefor (58). If the person entitled does not make claim to the surplus 'forthwith,' the innkeeper, etc., shall immediately pay over the same to the Treasurer of the North-West Territories to be kept by him for such owner for one year ; after which time, if such owner has not claimed the amount, the same shall form part of the General Revenue Fund of the Territories (59).

If the hotelkeeper refuses to receive for safe custody the goods or property of his guest, which the latter desires to deposit, or if the guest is, by reason of the hotelkeeper's default, unable to deposit his goods, the hotelkeeper will thereby disentitle himself to the benefit of the Ordinance (60).

The liability of the hotelkeeper for any loss of or injury to property brought to his hotel (not being a horse or other live animal, or any carriage, etc.) is,

(57) Con. Ord. N.W.T. 1898, c. 56.

(58) Sec. 2.

(59) Sec. 2.

(60) Con. Ord. N.W.T. 1898, c. 56, s. 5.

however, limited by the Ordinance to \$200, except in the following cases (61):—

(a) When the goods or property have been stolen, lost or injured through the default or neglect of the hotelkeeper or any servant in his employ ;

(b) When the goods or property have been deposited expressly for safe custody with the hotelkeeper ; but in the latter case the hotelkeeper may if he thinks fit require, as a condition to his liability, that the goods or property to be deposited shall be deposited in a box or other receptacle fastened and sealed by the person depositing the same (62).

In order to obtain the benefit of the Ordinance the hotelkeeper must keep a copy of same posted up in the hotel office and in the public rooms in the hotel, and it will enure to his benefit in respect of such goods only as are brought to his hotel while a copy of the Ordinance is so posted up (63).

Quebec—Liens of innkeepers and boarding house keepers.—Persons keeping a hotel, inn, tavern, public house or other place of refreshment, and boarding house keepers, and lodging house keepers, have a lien on the baggage and property of their guests, boarders, or lodgers, for the value or price of any food or accommodation furnished to them (64). They have, in addition to all other remedies, the right in case the amount remains unpaid for 3 months, to sell such baggage and property by public auction, on giving one week's notice of such intended sale, by advertisement in a newspaper published in the municipality in which such hotel, inn, tavern, public house, place of

(61) Sec. 4.

(62) Sec. 4 (2).

(63) Con. Ord. N.W.T. 1898, c. 56, s. 6.

(64) R.S. Que. 1888, art. 5820.

refreshment, boarding house or lodging house, is situated; or in case there is no newspaper published in such municipality, in a newspaper published nearest thereto (65). The notice must state the name of the guest, boarder or lodger, the amount of his indebtedness, a description of the baggage or other property to be sold, the time and place of sale, and the name of the auctioneer; and after the sale the innkeeper, boarding house keeper or lodging house keeper, may apply the proceeds of such sale in payment of the amount due to him, and the costs of such advertising and sale, and must pay the surplus (if any) to the person entitled thereto on application being made therefor (66).

The obligations of the keeper of a café or restaurant, as regards the effects of guests, are in Quebec province similar to those of an innkeeper (67).

Waiver of lien.—If an innkeeper allows a guest to depart with his goods while indebted to him, he thereby gives him credit, and he cannot afterwards detain them on their return to his inn as against a third person owning the same, except for debts which arose after the goods were returned (68). But if the goods over which the innkeeper has a right of lien are the property of the guest and the latter removes them after such right has accrued, but afterwards returns bringing the goods with him, the right of lien will revive (69).

An innkeeper who accepts security from his guest

(65) R.S. Que. 1888, art. 5820.

(66) R.S. Que. 1888, art. 5820; Civil Code Que. art. 1816a.

(67) *Dunn v. Beau* (1897) 11 Que. S.C. 538.

(68) *Hartley v. Hitchcock* 1 Stark. 408; *Jones v. Thurloe* 8 Mod. 172.

(69) *Huffman v. Walterhouse* (1890) 19 Ont. R. 186; *Mulliner v. Florence* 3 Q.B.D. 484.

for hotel charges does not necessarily waive his lien by so doing (70).

A hotelkeeper who seizes his guest's baggage by locking up the room assigned to the guest does not, by afterwards granting permission to the guest to remove some specified articles and by allowing him free access to the room for that purpose, abandon such seizure and detention as regards the other effects ; and the owner who removes any baggage as to which the permission does not extend is guilty of stealing the same under sec. 306 of the Criminal Code of Canada (71).

(70) *Angus v. McLachlan* 23 Ch. D. 330.

(71) *The Queen v. Hollingsworth* (1886) 2 Can. Cr. Cas. 291, per Rouleau J. (N.W.T.)

CHAPTER XIV.

LIENS ON HORSES AND CATTLE.

Subject to what liens.—Horses and cattle may be, as chattels, the subject of various classes of liens; but those to which special reference will be made in this chapter are the liens of livery stable keepers, horse breeders and agistors of cattle. Livery stable keepers and agistors of cattle have no lien at common law for the *keeping* of horses or cattle (1); but they may have for charges for exercising and training a horse to run at races, or the like special services (2). And the owner of a stallion has a lien upon a mare for the charge for serving the mare (3).

A livery stable keeper does not come within the rule giving a lien for the benefit of trade, nor is it considered that the feeding and taking care of the animal imparts any new value to it so as to justify a lien upon that ground (4). Livery stable keepers are not under the strict liability as insurers which the law imposes upon common carriers and innkeepers; with the latter classes the strict liability is imposed "by reason of the necessity of the thing" (5); but with livery stable keepers, bailiffs, factors and such like, it is considered to be unreasonable to charge any of them with a trust

(1) Jones on liens sec. 641.

(2) *Bevan v. Waters* 3 C. & P. 530; *Forth v. Simpson* 13 Q.B. 680.

(3) *Scarfe v. Morgan* 4 M. & W. 270.

(4) *Grinnel v. Cook* 3 Hill (N.Y.) 485.

(5) *Coggs v. Bernard* 1 Smith's L.C. 8th ed. 199, 2 Ld. Raym. 917.

further than the nature of the thing puts it in his power to perform it (6).

His obligation to take reasonable care of the thing entrusted to him involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state so that the thing therein deposited may be reasonably safe in it (7). A lien may, of course, be created by agreement between the stable keeper and the horse owner (8), but a neglect of any of the duties before mentioned will give rise to a counterclaim for the damages incurred to be off-set against the lien claim.

A horse trainer has a lien for his charge in keeping and training a horse, provided he holds possession of the horse (9), but if the horse be so far under the control of the owner as to be put under the charge of his servants from time to time during the training, there will be no lien, for the reason that such control by the owner deprives the trainer of that continued possession essential to liens (10).

A horse-shoer or farrier is under the like legal obligation to shoe a horse, as a common carrier is to convey goods (10a); and this would appear to entitle him to a lien on the horse, but the right has been

(6) *Ibid*, per Lord Holt; *Readhead v. Midland*, L.R. 4 Q.B. 379; *Francis v. Cockrell*, L.R. 5 Q.B. 184, 501.

(7) *Scarl v. Laverick* (1874), L.R. 7 Q.B. 122.

(8) *Yorke v. Grenaugh*, 2 Ld. Raym. 866; *Orchard v. Rackstraw* 9 C.B. 608; *Judson v. Etheridge*, 1 C. & M. 743.

(9) *Reilly v. M. Illmurray* (1898) 29 Ont. R. 167; *Bevan v. Waters*, 3 C. & P. 520, M. & M. 236; *Scott v. Mercer* (Iowa) 67 N.W. Rep. 108.

(10) *Forth v. Simpson*, 13 Q.B. 680.

(10a) *Lane v. Cotton* 1 Salk R. 17.

doubted in Ontario (10*b*). In the United States it is held that a farrier has a lien for shoeing a horse (10*c*).

Power of sale. A livery stable keeper, with whom a horse is left to be taken care of, is given, in Ontario, a statutory power to sell a horse for its keep only in case he already has a lien on the same. The statute provides as follows :

"Where an innkeeper, boarding house keeper, lodging house keeper or livery stable keeper *has by law a lien* upon a horse or other animal for the price or value of any food or accommodation supplied to such animal, or for care or labour bestowed thereon, he shall, in addition to all other remedies provided by law, have the right, in case any part of such price or value remains unpaid for the space of two weeks, to sell by public auction such horse or other animal on giving two weeks' notice by advertisement in a newspaper published in the municipality in which the inn, boarding house, lodging house, or livery stable is situate, or in case there is no newspaper published in the municipality, in a newspaper published nearest to such inn, boarding house, lodging house, or livery stable, of the intended sale, stating (if known) the name of the person or persons who brought such horse or other animal to the inn, boarding house, lodging house, or livery stable, the amount of the indebtedness, a description of the horse or other animal, and the name of the auctioneer; and after the sale, the innkeeper, boarding house keeper, lodging house keeper, or livery stable keeper may apply the proceeds thereof in payment of the amount due to him in respect of food or accommodation supplied or care or labour

(10*b*) *Nicolls v. Duncan* (1854) 11 U.C.R. 332.

(10*c*) *Lord v. Jones* 24 Me. 439; *Cummings v. Harris* 3 Vt. 244.

"bestowed as aforesaid, and the costs of such advertisement and sale, and shall pay over the surplus, if any, to the person entitled thereto on application being made by him therefor" (11).

It will be observed that this statute confers no right of lien, but only a right of *sale* in cases in which the right of lien already exists. An innkeeper undoubtedly has a right of lien upon horses brought to the inn by his guest, but, as has already been noted, the livery stable keeper has no such common law right for the mere keep of the horse, although he may acquire a lien in respect of special services such as horse training. The section above quoted would, however, apply to confer a power of sale upon the stable keeper in cases in which, by contract express or implied, a lien has been created.

Waiver of lien.—Continuance of possession is indispensable to the existence of a lien at common law, and the abandonment of the custody of the property over which the right extends divests the lien. The lien-holder in such case is deemed to surrender the security he has upon the property, and to rely upon the personal responsibility of the owner. If, however, a sale of the property be made by the owner while it is in the possession of the person holding it under the lien, and without his participation or consent, the sale will not divest it, and the purchaser in that case will take it subject to the incumbrance (12).

In the State of New York it has been held that a livery stable keeper waives his lien by transferring his stable to a purchaser and delivering up with the possession of the stable a customer's horse upon which he

(11) R.S.O. 1897, c. 187, s. 2 (2).

(12) *Marseilles Mfg. Co. v. Morgan* 12 Neb. 66; 10 N.W. Rep. 462.

had a lien, under a new arrangement with the purchaser by which the further expense of keeping the horse was charged by the latter to the customer (13). It was considered that the purchaser became, under such an arrangement, the owner's agent, and that the purchaser's possession was the owner's possession, and this voluntary surrender was a relinquishment of the former stable keeper's lien, which could only be preserved by some understanding made at the time, by which the purchaser was to hold the property for the benefit of the lien claimant and for the preservation of his lien (14).

A continuing right of possession of the animal must accompany the services rendered by a trainer for which he claims a lien on a horse which he has trained, in order to render such lien valid ; and a trainer who had delivered up possession of a horse which he had been training to the administratrix of the owner from whom he had received it, and who afterwards resumed possession under a new agreement with the administratrix to take care of the horse, was held to have lost any lien he might have had (14a).

If the owner agrees by the contract that the agistor shall have a lien upon the animal, the lien so created will not be lost by the fraudulent removal of the animal from the agistor's custody, and the latter may re-take possession for the purposes of the lien (15).

(13) *Fitchett v. Canary* 38 N.Y. 531 ; 14 N.Y. Supp. 479.

(14) Jones on Liens 2nd ed. 701.

(14a) *Reilly v. McIlmurray* (1898) 29 Ont. R. 167.

(15) *Wallace v. Woodgate* 1 C. & P. 575 ; *Richards v. Symons* 8 Q.B. 90.

Manitoba Statutory lien of stable keeper. By the Manitoba "Stable Keepers' Act" (16) every livery stable keeper and keeper of a boarding or sale stable shall have for the value or price of any food, care, attendance or accommodation furnished for an animal a lien thereon and on any vehicle, harness, furnishings or other gear appertaining thereto or any personal effects of which he holds possession belonging to any person who is indebted to him for stabling, boarding or caring for such animal; and, in addition to all remedies provided by law, shall have the same rights and privileges for exercising and enforcing such lien, in so far as the same may be applicable, as boarding house keepers and innkeepers have under the Manitoba Innkeepers' Act (17).

The stable keeper may only exercise the right of detention before the animal, or other effects mentioned, has been removed out of his custody and possession and not afterwards (18). The right of detention has priority, by virtue of an amending Act passed in 1899 (19), over any existing lien, chattel mortgage, bill of sale or other charge or encumbrance of whatsoever nature or kind affecting the animal.

If the owner does not reclaim and obtain the release of any such animals and effects within one month from the commencement of the detention, the person detaining may cause them to be sold by public auction, and after paying himself the amount for which he has a lien and paying the costs of sale he shall pay over to the owner of such animals and effects the balance, if any, of the price thereof (20). If the owner

(16) R.S.M. (1891), c. 91.

(17) R.S.M. 1891, c. 73.

(18) R.S.M. 1891, c. 91, s. 3.

(19) Stat. Man. 1899, c. 18, s. 1.

(20) R.S.M. 1891, c. 91, s. 4; Stat. Man. 1899, c. 18, s. 2.

cannot be found then the balance is to be handed over to the Clerk of the County Court of the judicial division within which the stable is situate to be kept by the Clerk for one year; after which time, if the owner "do not appear or claim the amount so kept," the same shall be paid over to the Provincial Treasurer, and form part of the Manitoba Consolidated Revenue Fund (21). Unless the animal is sooner released, the stable keeper exercising his right of lien must keep the animal and other effects detained, for the full period of three months before he can legally sell them (22). The same privileges, rights and exemptions apply to persons leaving animals, furniture, vehicles and the gear thereunto belonging to be kept boarded or cared for at a livery, boarding or sale stable as are made to apply to lodgers and boarders under the Manitoba Distress Act (23); and they will therefore be liable to be distrained for rent due by the stable keeper to his landlord, only to the extent of the charges due to the stable keeper in respect thereof (24). The keeper must have a copy of "The Stable Keepers' Act" of Manitoba conspicuously posted up in the office of the stable and in at least two other conspicuous places in the stable (25); and it is only upon compliance with this provision that he is entitled to the benefit of the Act (26); but the copies are required to be posted up only when the horses, etc., are brought to the stable and it is not

(21) R.S.M. 1891, c. 91, s. 5.

(22) R.S.M. 1891, c. 91, s. 4.

(23) R.S.M. 1891, c. 46.

(24) R.S.M. 1891, c. 91, s. 8.

(25) R.S.M. 1891, c. 61, s. 6.

(26) R.S.M. 1891, c. 91, s. 7; R.S.M. 1891, c. 73, s. 8.

material that they should be kept posted up through the whole period of detention (27).

N. W. Territories—Statutory lien of stable keeper.

—By an Ordinance of the Legislature of the North West Territories (28) it enacted that every livery stable, boarding stable or sales stable keeper shall have a lien on the animals and the vehicle, harness, etc., left in his possession, for the value or price of any food, care, attendance or accommodation furnished for any such animal or effects, and, in addition to all other remedies provided by law, may detain in his custody and possession any animal, vehicle, harness, furnishings or other gear appertaining thereto and the personal effects of any person who is indebted to him for stabling, boarding or caring for such animal (29). And by the interpretation clause of the Ordinance it is declared that the expression "livery stable keeper" means and includes any person who for a money consideration or the equivalent thereof carries on the business of letting or hiring out carriages, sleighs or other vehicles, or horses or other animals, whether with or without a carriage, sleigh or other vehicle, and whether accompanied by an employee of the livery stable keeper or not; that the expression "boarding stable keeper" means and includes any person who, for a money consideration or its equivalent, stables, boards or cares for any animal; and that the expression "sales stable keeper" means and includes any person who stables, boards or cares for any animal other than his own, with the intention of selling or disposing of the same, and who receives or is to receive payment for such services

(27) *Dudley v. Henderson* (1886) 3 Man. R. 472.

(28) No. 40 of 1897, Con. Ord. N.W.T. 1898, c. 57.

(29) Con. Ord. N.W.T. c. 57, s. 3.

whether in the nature of a commission or otherwise (30).

Every livery stable, boarding stable or sales stable keeper, who has exercised such right of detention is obliged to keep in his possession and be responsible for the proper care of any animal or effects detained by him for the full period of such detention unless they shall sooner be released; and if the owner does not reclaim the animals and effects so detained by paying the indebtedness in respect of the same within one month from the commencement of such detention, the keeper detaining may sell or cause the same to be sold by public auction on giving two weeks' notice of sale by advertisement in the newspaper published nearest to such stable (or if more than one newspaper be published in the same locality, then in either one) and by posting up notices in the nearest post office and in the said livery or boarding stable of the intended sale (31).

The advertisement in the newspaper and the notices posted up should state, so far as the same are known to the stable keeper, the following particulars (31a):

(a) The names of the owner and the person or persons who brought such animals or effects to the stable;

(b) The amount of indebtedness and charges for detention;

(c) A description of the animals and effects; and

(d) The name of the seller.

The proceeds derived from such sale shall be applied as follows:

(30) Sec. 2.

(31) Con. Ord. N.W.T. 1898, c. 57, s. 4.

(31a) Sec. 4.

(a) In paying the expenses incurred by such detention, advertising and sale ;

(b) In paying the debt for which such detention was made ; and the surplus if any shall be paid to the person entitled thereto on application being made by him therefor (32).

In case such owner does not apply for the same within one month from the day of such sale then such surplus shall be handed over to the Territorial treasurer to be kept by him in a special trust account for one year, after which time, if such owner does not appear or claim the amount so kept, the same shall be paid over and belong to the general revenue fund of the Territories (33).

It is the duty of every livery stable, boarding stable and sales stable keeper to have a copy of this Ordinance hung or posted in a conspicuous place in his stable and in default he is not entitled to the benefit of the Ordinance (34).

Horse breeder's lien—Manitoba.—By the Horse Breeder's Lien Act of Manitoba (35) it is enacted that :—

Any owner of a stallion domiciled in Manitoba and registered in any of the following stud books, that is to say, The Clydesdale Stud Book of Great Britain and Ireland, The Clydesdale Stud Book of Canada (appendix excepted), The English Shire Horse Stud Book, The Suffolk Stud Book of Great Britain, Stud Book Percheron de France, Percheron Stud Book of America, Stud Book des Chevaux de Traits Francais, The English General Stud Book (for thoroughbred horses), The American Stud Book (for thoroughbred

(32) Con. Ord. N.W.T. 1898, c. 57, s. 5.

(33) Sec. 6.

(34) Sec. 7.

(35) Stat. Man. 1893, c. 15, as amended by Stat. Man. 1899, c. 15.

horses), The Stud Book Francais (for thoroughbred horses), The American Trotting Register, The Stud Book Francais des Chevaux Demi-Sang, Stud Book des Eleveurs Francais de la Race des Chevaux Demi-Sang, Stud Book of the Royal Prussian Main Stud Trakehnen, Hanoverian Stud Book of Germany, Oldenburger Gestutbuch, Stud Book of the Holstein Elb Marshes, Cleveland Bay Stud Book of Great Britain, Yorkshire Coach Horse Stud Book, Hackney Stud Book of Great Britain, Canadian Shire Horse Stud Book, American Shire Horse Stud Book, Canadian Hackney Horse Stud Book, American Hackney Stud Book, may register such stallion in the Department of Agriculture and Immigration and procure a certificate of such registration in a form to be prescribed by the Minister of said Department.

Such owners shall pay to the said Department for such registration the sum of \$5.00 (36).

Every bill, poster and advertisement issued by the owner of such stallion, or used by him for advertising such stallion, shall contain a copy of such certificate, otherwise the owner shall not be entitled to the benefit of the Act (37).

The owner of any stallion registered under the second section of the Act, or his agent, may file in the office of the Clerk of the County Court of the judicial division in which the owner or person in charge of any mare upon which such stallion performs service resides, within ~~nine months~~ ^{year} after service has been performed, a statutory declaration setting forth:

- (1) The amount of service fee.
- (2) That the same is unpaid.
- (3) The fact of such service.
- (4) A reasonable description of such mare, and

(36) Sec. 2.

(37) Sec. 3.

Stat. March 1870 Ch. 8 sec. 3

(5) The name and residence of the owner of such mare.

And the County Court Clerk shall file the declaration upon receipt of a fee of ten cents (38).

The owner of such stallion upon filing such declaration [referred to in the statute as an affidavit] and complying with the provisions of the Act shall have a lien to the amount of said service fee and costs as therein provided upon the colt or filly, the offspring of any such stallion from the service in respect of which the said declaration is filed, which lien shall take and have priority over any and all writs of execution, chattel mortgages, bills of sale, liens, claims and encumbrances whatsoever (39).

If payment of the service fee is not made before the first day of January in the year following the year in which the colt or filly is born, the owner of said stallion or his duly authorized agent may, at any time before the first day of May following, take possession of the colt or filly upon which the statute gives him a lien wherever the same may be found, and may proceed to sell the same by public auction after giving the person in whose possession the said colt or filly was when taken, ten days notice in writing of such intention to sell, which notice may be effectually given to such person by delivering the same to him personally, or by posting the notice up on the door of such person's last known place of residence in Manitoba (40).

The proceeds of the sale shall be applied, first in payment of the reasonable expenses of the taking of possession, giving of notice, and conduct of sale not in

(38) Sec. 4.

(39) Sec. 5.

(40) Sec. 6.

all in any case exceeding \$10, and next in payment of the service fee; and the balance shall be paid by the owner of the stallion to the person from whose possession such colt or filly was taken, on demand (41).

Horse breeder's lien—N. W. Territories. By an Ordinance of the North West Territories assented to on April 29, 1899 (42) it was enacted that any person residing in the North West Territories who is the owner of a stallion registered in any recognized stud book approved by the Commissioner of Agriculture, on payment of a fee of \$5, may register such stallion in the Department of Agriculture (N.W.T.) and procure a certificate of such registration in a form to be prescribed by the Commissioner (43). The certificate is transferable upon the sale of the animal upon payment of a transfer fee of \$1 (44).

The owner of any stallion *registered* under the Ordinance, or his agent, may file in the office of the registration clerk of the registration district for mortgages and other transfers of personal property in which the owner or person in charge of any mare upon which such stallion performs service resides, within 3 months after such service is performed, a statutory declaration setting forth:

- (a) The amount of service fee;
- (b) That the same is unpaid;
- (c) The fact of such service;
- (d) A reasonable description of such mare; and
- (e) The name and residence of the owner of such mare.

(41) Sec. 7.

(42) Ord. N.W.T. 1899, c. 20.

(43) Sec. 2.

(44) Sec. 2.

The registration clerk shall file the statutory declaration upon receipt of ten cents (45). The Ordinance then declares that the owner of such stallion—"upon filing such *affidavit*" [the statutory declaration is evidently referred to], and complying with the provisions of the Ordinance, shall have a lien to the amount of said service fee, and costs as thereafter provided, upon the colt or filly, the offspring of any such stallion, for the service in respect of which such affidavit [statutory declaration] is filed (46).

The lien takes priority, by virtue of an express provision in the statute, over any and all writs of execution, chattel mortgages, bills of sale, claims and encumbrances whatsoever (47). The lien conferred by statute in favour of the horse breeder would, apart from this provision, take priority over the right of a chattel mortgagee of the mare taking his security while the mare was in foal (48); and the effect of the statute appears to be that priority is given to the statutory lien as against any encumbrance or conveyance. If payment of the service fee is not made before January 1st in the year following the year in which the colt or filly is born, the owner of the stallion, or his duly authorized agent, may at any time before the 1st day of May following, take possession of the colt or filly upon which he has such lien wherever the same may be found, and may proceed to sell the same by public auction after giving the person in whose possession the said colt or filly was when taken, ten days notice in writing of such intention to sell (49).

(45) Sec. 4.

(46) Sec. 5.

(47) Sec. 5.

(48) *Sims v. Bradford* 12 Lea (Tenn.) 434.

(49) Sec. 6.

The notice may be effectually given either by delivering the same personally, or by posting it up on the door of the last known place of residence in the Territories, of the person to be served (50). The proceeds of the sale of the colt or filly are to be applied, firstly in payment of the reasonable expenses of the taking of possession, giving of notice, and conduct of sale (not in all in any case to exceed \$10), and next in payment of the service fee; and the balance must be forthwith paid by the owner of the stallion to the person from whose possession the colt or filly was taken (51).

Cattle Lien Act—British Columbia.—By the Cattle Lien Act of British Columbia (52), it is enacted that every keeper of a livery, boarding, or sale stable, and every agister of cattle, shall have a lien on any cattle, and any effects left therewith by the owner of such cattle, for the value or price of any food, care, attendance or accommodation furnished for any such cattle (53). The word "cattle" is to be construed in the statute as including "horses, mares, fillies, foals, colts, geldings, bulls, bullocks, cows, heifers, steers, calves, sheep, goats, swine, mules, jennets and asses" (54).

The keeper of a livery, boarding or sale stable in British Columbia, and any agister of cattle, may detain in his custody and possession, before the same shall have been removed out of his custody and possession, but not afterwards, any cattle, vehicle, harness, furnishings, or other gear appertaining thereto, or any personal effects of any person who is indebted to him

(50) Sec. 6.

(51) Ord. N.W.T. 1899, c. 20, s. 20.

(52) Stat. B.C. 1893, c. 6; R.S.B.C. 1897, c. 39.

(53) R.S.B.C. 1897, c. 39, s. 3.

(54) Sec. 2.

for stabling, boarding, or caring for such cattle (55). The duty is imposed by the statute upon every keeper of any livery, boarding or sale stable to keep a copy of the "Cattle Lien Act" conspicuously posted up in the office and in at least two other conspicuous places in every stable (56); but no penalty or forfeiture is mentioned therein in case of non-compliance.

Every keeper of a livery, boarding or sale stable, and every agister of cattle, is obliged to keep in his possession, and will be responsible for, any cattle and effects detained by him, for the full period of detention, unless they shall be sooner released; and, if the owner does not reclaim and release any such cattle and effects so detained within three months from the commencement of the detention, the person detaining the same may cause them to be sold by public auction; and after paying himself, and the costs of sale, he shall pay over to the owner of the cattle and effects the balance of the price received (57). If the owner cannot be found, the balance, if any, of the purchase money is to be handed over to the Registrar of the County Court for the county within which the sale took place, to be kept by the Registrar for the owner for one year; after which time, if the owner do not appear or claim the amount so kept, the same shall be paid over to the Provincial Treasury, and form part of the Consolidated Revenue Fund of the Province (58).

(55) Sec. 4.

(56) Sec. 7.

(57) R.S.B.C. 1897, c. 39, s. 5.

(58) R.S.B.C. 1897, c. 39, s. 6.

CHAPTER XV.

WORKMEN'S LIENS.

Lien on chattel for work done thereon.—In general, where a person bestows his labour on a particular chattel delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge (1). The workman who manufactures a chattel out of material furnished by the customer has a lien on it for his services (2).

The lien of a workman for repairing a chattel is not confined to the value of the work done by himself and the workmen regularly employed by him, but will include the repairs which the workman entrusted with the job has let out to another person, and notwithstanding that the chattel has been sent to such other person in a foreign country without the special direction of the owner (3). But a servant has no lien upon the property of his master which he has, as a servant, got into his possession; and a compositor who sets up type in his employer's printing office has no lien on the type for his wages (4). A printer has a lien on the sheets he prints and on the stereo plates he makes for the work, but he has no lien on the "copy" or on stereo plates not supplied by him but put into his hands to print from, unless by express contract

(1) *Bleaden v. Hancock* 4 C. & P. 152; *Steadman v. Hockley* 15 M. & W. 553.

(2) *Gregory v. Styker* 2 Denio (N.Y.) 628; *Curtis v. Jones*, Howard's App. (N.Y.) 137.

(3) *Webber v. Cogswell* (1877) 2 Can. S.C.R. 15.

(4) *Franklin v. Hosier* (1821) 4 B. & Ald. 341.

between him and his employer it has been so provided (5).

A brickmaker who makes bricks for another person in a brickyard belonging to that person, and who has possession of the yard while engaged in making the bricks, is entitled to a lien upon them (6), and where a mechanic made piano cases for his employer at a place assigned to him in the employer's shop, at an agreed price out of material supplied by the employer, the mechanic employing workmen to assist him, it was held that he had a lien upon piano cases of which he retained actual possession, as against the holder of a chattel mortgage from the employer (7).

A miller has a lien upon meal which he has ground from corn furnished by his customer (8); and an engraver has a lien on plates engraved by him (9).

A person employed to dye cloth is entitled to a lien thereon (10); and so is one who manufactures cloth from materials furnished (11), and the tailor who makes the cloth into an article of clothing (12).

The lien continues only while the workman or bailee continues in possession of the chattel; and if he delivers it up he has only a right of action for the work done (13). A specific lien for work done

(5) *Bleaden v. Hancock* (1829) M. & M. 465; 4 C. & P. 152.

(6) *Roberts v. Bank of Toronto* (1894) 21 Ont. App. 629; *Moore v. Hitchcock* 4 Wend. (N.Y.) 292; *King v. Indian Co.* 11 Cush. (Mass.) 231.

(7) *Shaw v. Kaler* 106 Mass. 448.

(8) *Chase v. Westmore* 5 M. & S. 180.

(9) *Marks v. Lahee* 3 Bing. N.C. 408.

(10) *Green v. Farmer* 4 Burr. 2221.

(11) *Moore v. Hitchcock* 4 Wend. (N.Y.) 292.

(12) *Cowper v. Andrews*, Hobart K.B. 42.

(13) *Stickney v. Allen* 10 Gray (Mass.) 352.

exists in favour of a carriage maker for repairing a carriage (14).

A packer has a lien upon the goods packed by him for the materials used and work done in packing (15). The lien is allowed for work in cutting up logs into boards or shingles (16). And one who takes window sashes into his possession for the purpose of furnishing glass for them and doing the glazing thereon has a common law lien upon the sashes for such work so long as they remain in his possession (17).

A horse trainer has a lien on the horse left with him for training, for his services rendered, provided he has a continuing right of possession of the horse throughout the whole period during which the training takes place (18).

A verbal agreement that one who had by a written contract undertaken to produce by his labour a chattel, which is to become the property of another when the labour is performed, shall have a lien on such product for the money to be paid as the reward of his labour, does not derogate from the contemporaneous writing; and evidence is admissible to prove such a verbal agreement if it is not in any way inconsistent with or contradictory of the written agreement (19).

By the Civil Code of Quebec (20) each person engaged to fish or assist at any fishing or in the

(14) *Rushforth v. Hadfield* 7 East 224.

(15) *Hayward v. G. T.R.* 32 U.C.R. 392.

(16) *Comstock v. McCracken* 53 Mich. 123; *Arians v. Brickley* 65 Wis. 26; *Pierce v. Sweet* 33 Pa. St. 151.

(17) *McMeekin v. Worcester* (Iowa) 68 N.W. Rep. 680.

(18) *Reilly v. McIlmurray* (1898) 29 Ont. R. 167.

(19) *Byers v. McMillan* (1887) 15 Can. S.C.R. 194; *Erskine v. Adeane* 8 Ch. App. 764; *Morgan v. Griffith*, L.R. 6 Ex. 70.

(20) C.C. art. 1994 a; R.S.Q. art. 5826.

dressing of fish, either by written agreement or otherwise, has, for securing his wages or share, a first lien preferable to any other creditor upon the produce of his employer's fishery.

Lien denied.—Unless the work is done at the owner's request, or with his consent, express or implied, the lien does not arise. So where a carriage was delivered for repairs to a carriage maker by the owner's servant who had negligently broken it, and taken it to be repaired before the master was aware of the injury, it was held that no lien could be maintained in respect of the repairs (21). The owner's consent may, however, be implied from the circumstances of the case, as where the repairs were of benefit both to the party ordering them and to the owner of the chattel, and the chattel was being used for their joint benefit (22).

No lien attaches to personal property in a store for work done in taking down and removing such property and putting it in place again (23).

Priority over chattel mortgage.—The fact that a mortgagor of chattels is allowed to remain in possession thereof and to use them for profit raises an implication that he has the mortgagee's authority for the creation of a specific lien for repairs (24). When the property is to be retained and used by the mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage, when it is property liable to need repairs, that it

(21) *Hiscox v. Greenwood* 4 Esp. 174.

(22) *White v. Smith* 44 N.J.L. 105.

(23) *Engelhardt Co. v. Benjamin*, 5 App. Div. (N.Y.) 475, 39 N.Y. Supp. 31.

(24) *Hammond v. Danielson* 126 Mass. 294.

is to be kept in repair; and when the property is machinery, or property of a character which renders it necessary to intrust it to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made; and as such necessary repairs are for the betterment of the property, and add to its value to the gain of the mortgagee, the common law lien in favour of the mechanic for the value of the repairs is paramount to the lien of the mortgagee, and the latter is presumed to have contracted for the mortgage with a knowledge of the law giving a lien to the mechanic for repairs (25).

But upon a mortgage being made of an engine in course of construction there is no implied authority to the mortgagor to incur a lien in priority to same in respect of work done for the mortgagor in completing it (26).

Termination and waiver of lien. Where a person contracts to make an article for an agreed price and on its completion refuses delivery after tender of the sum agreed upon, and claims a larger amount, the tender has the effect of terminating the lien (27).

A workman contracting to make the wood-work of a wagon and who after completion of that work forwards it, in the name of the person for whom it is being made, to the blacksmith for the iron work, but gets it back from the blacksmith, may still enforce his lien for work done thereon, for the lien revived upon his again obtaining possession of the wagon (28).

(25) *Watts v. Sweeney* 127 Ind. 116, 26 N.E. Rep. 680.

(26) *Globe v. Wright* 106 Mass. 207.

(27) *Willis v. Sweet* 20 N.S.R. 449; *Davison v. Mulcahy* 7 R. & G.N.S. 209.

(28) *Milburn v. Milburn* 4 U.C.R. 179.

If an artist contracts to accept for his services a stated sum in cash and a security for the balance payable at a future date, a lien cannot be set up after payment of the cash instalment and tender of the security agreed on, at all events until default is made under the latter (29). A counterclaim will not destroy the lien unless it has been agreed between the parties that the one account should be deducted from the other (30).

Statutory power of sale—Ontario.—Every mechanic or other person who has bestowed money, or skill and materials, upon any chattel or thing in the alteration and improvements in its properties or for the purpose of imparting an additional value to it so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money or skill and materials bestowed, is given by statute while such lien exists, but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, the right in addition to all other remedies provided by law, to sell by auction the chattel or thing in respect of which the lien exists, on giving one week's notice by advertisement in a newspaper published in the municipality in which the work was done (or in case there is no newspaper published in such municipality, then in a newspaper published nearest thereto) stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the last known place of residence (if any) of the owner, if he be a resident of such

(29) *Dempsey v. Carson* 11 U.C.C.P. 462.

(30) *McFatridge v. Holstead* (1889) 21 N.S.R. 325; *Pinnock v. Harrison* (1838) 3 M. & W. 532.

municipality (31). Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him and the costs of advertising and sale, and shall upon application pay over any surplus to the person entitled thereto (32).

Power of sale in British Columbia.—Under the Mechanics' Lien Act (B.C.) (33) every mechanic or other person who has bestowed money or skill and materials upon any chattel in the alteration and improvement of its properties, or increasing its value, so as thereby to become entitled to a lien thereon for the amount or value of the money, skill or materials bestowed, has, while such lien exists but not afterwards, in case the amount, to which he is entitled remains unpaid for *three months* after the same ought to have been paid, the power to sell the chattel on giving *two weeks' notice* by advertisement in a newspaper published in the city, town or county in which the work was done, or in case there is no newspaper published in such city, town or county, then in a newspaper published nearest thereto, stating the name of the person indebted, the amount of his indebtedness, a description of the chattel to be sold, and the time and place of sale. The statute further directs that after the sale, such mechanic or other person shall apply the proceeds in payment of the amount due to him, and the cost of advertising and sale, and shall pay over the surplus (if any) to the person entitled thereto, on application being made to him therefor, and a notice in writing of the result of the sale shall be left at or posted to the address of the owner at his last known place of abode or business (34).

(31) R.S.O. 1897, c. 153, s. 51 (1).

(32) R.S.O. 1897, c. 153, s. 51 (2).

(33) R.S.B.C. 1897, c. 132, s. 23.

(34) R.S.B.C. 1897, c. 132, s. 23.

North-West Territories—Power of sale.—Every mechanic or other person who has bestowed money or skill and materials upon any chattel or thing in the alteration and improvement of its properties or for the purpose of imparting an additional value to it so as thereby to be entitled to a lien upon such chattel or thing for the amount or value of the money or skill and materials bestowed, shall, while such lien exists but not afterwards, in case the amount to which he is entitled remains unpaid for three months after the same ought to have been paid, have the right, in addition to all other remedies provided by law, to sell the chattel or thing in respect of which the lien exists, on giving one month's notice by advertisement in a newspaper published in the locality in which the work was done, or in case there is no newspaper published in such locality or within ten miles of the place where the work was done, then by posting up not less than five notices in the most public places within the locality for one month, stating the name of the person indebted, the amount of the debt, a description of the chattel or thing to be sold, the time and place of sale, and the name of the auctioneer, and leaving a like notice in writing at the residence or last known place of residence, if any, of the owner as the case may be, or by mailing the same to him by registered letter if his address be known (35).

Such mechanic or other person shall apply the proceeds of the sale in payment of the amount due to him and the costs of advertising and sale, and shall upon application pay over any surplus to the person entitled thereto (36).

Jeweler's lien—New Brunswick.—The following statutory provision exists in the Province of New

(35) Con. Ord. N.W.T. 1898, c. 59, s. 31.

(36) Con. Ord. N.W.T. 1898, c. 59, s. 31 (a).

Brunswick : " All watches, jewelry and other articles, left by any person with any watchmaker or jeweler in this Province to be mended or repaired in any way, may, if no agreement is made to the contrary, if not called for within *two* years from the time such watch, jewelry or other article, was left as aforesaid, be sold at public auction by the watchmaker or jeweler, upon four weeks' public notice of the time and place of sale, which place shall be in the parish, city or town where the watchmaker or jeweler resides, posted in three or more public places in such parish, city or town, and also in two successive issues of a newspaper published in the county, if any such newspaper is published, *and in two consecutive issues of the Royal Gazette*, and such notice shall have specified therein the name of the person who left such watch, jewelry or other article, if known, the date when the same was left, and if a watch, the maker and number of the watch, and the amount of charges thereon (37).

The amendment, indicated by the words added in italics, is by the provisions of the amending Act (38), not to apply so as to affect any watches, jewelry or other articles left by any person with any watchmaker or jeweler in New Brunswick to be mended or repaired, until after July 1, 1899.

If such watches, jewelry or other articles are sold, and realize more than the charge due thereon with interest, together with the costs and expenses of advertising and selling, the surplus shall be paid by the watchmaker or jeweler, on demand, to the person who left the same for repairs, or to his or her legal representatives ; provided nevertheless that such demand shall be made therefor within six months

(37) Cons. Stat. N.B. (1877) c. 95, s. 1, as amended by Acts of N.B., 1898, c. 10.

(38) Stat. N.B. 1898, c. 10, s. 2, passed 18 March, 1898.

after such sale ; and in the event of no such demand being made before the expiration of the six months the surplus shall be paid to the Receiver General, and the watchmaker or jeweler shall at the same time file with the Receiver General a copy of the advertisement under which such sale was made, and a detailed statement of the articles sold and prices obtained.

If the owner of any watch or jewelry so sold, or his legal representative, shall make application within 6 years for the sum so paid in, the Receiver General is authorized to pay back the same to him (39). The Receiver General referred to is the Receiver General of the Province of New Brunswick at Fredericton, N.B.

If any sale be made under the provisions of the Act, and the watchmaker or jeweler refuse or neglect, upon demand duly made under the provisions thereof, to pay the surplus of any such sale after deducting the amounts thereby authorized to be deducted to the person entitled to receive the same, or if the watchmaker or jeweler shall omit for the space of four weeks after the expiration of six months from the time of any such sale (in case the said surplus has not been demanded) to pay such surplus into the hands of the Receiver General, and to file the statement and copy of the advertisement of sale, such watchmaker or jeweler will be liable in any such case to a penalty of not exceeding \$100, to be recovered before any two Justices of the Peace, or before any Police or Stipendary Magistrate residing in the county where such watchmaker or jeweler resides (40).

Threshers' liens — N. W. Territories.— In every case in which any person threshes or causes to be

(39) Cons. Stat. N.B. (1877) c. 95, s. 2.

(40) Con. Stat. N.B. (1877) c. 95, s. 3.

threshed grain of any kind for another person, at or for a fixed price or rate of remuneration, the person who so threshes the grain, or causes the same to be threshed, is given in the North-West Territories a statutory right to retain a quantity of such grain sufficient for the purpose of securing payment of the fixed price or remuneration, if such grain is taken at the time when the threshing is finished or within 30 days thereafter (41). The quantity of grain which may be so retained shall be a sufficient quantity, computed at the market value thereof at the nearest market, less two and one-half cents per bushel for each 10 miles between the place of threshing and the nearest market for hauling the same to and delivering the same at the nearest available market, when sold, to pay for the threshing of all grain threshed by the person taking the grain, or by his servants or agents, for the owner thereof during that same season (42). The right to retain and remove such quantity of grain shall, if exercised forthwith after the threshing is finished, prevail over all writs of execution against the owner thereof, or chattel mortgages, bills of sale or conveyances, made by him, and over rights of distress for rent reserved upon the land upon which the grain is threshed, and the person performing such work of threshing, or procuring the same to be done, shall be deemed a purchaser for value of the grain which he takes by virtue of the Ordinance (43).

(41) Con. Ord. N.W.T. 1898, c. 60, s. 2, as amended by Ord. 1899, c. 11.

(42) Con. Ord. N.W.T. 1898, c. 60, s. 2, as amended by Ordinance of 1899, c. 11.

(43) Con. Ord. N.W.T. 1898, c. 60, s. 3, as amended by Ord. of 1899, c. 11.

Threshers' liens—Manitoba.—In the Province of Manitoba any person who threshes, or causes to be threshed, grain of any kind for another person at or for a fixed price or rate of commission, has a statutory right to retain, for the purpose of securing payment of the price, a sufficient quantity of the grain to pay, when sold, for the threshing of all grain threshed for the owner by the person retaining the grain, or by his servants or agents, within 30 days prior to the date when such right of retention is asserted (44). The grain is to be considered as still in the possession of the person by whom or by whose servants or agents it is threshed, and as subject to this right of detention, although the same has been piled up or placed in bags or other receptacles, unless and until said grain is sold and delivered to a bona fide purchaser and value received therefor, and unless it has been removed from the premises and vicinity where the grain was threshed, and out of the possession of the person for whom the threshing was done (45). The threshers' lien given by this statute is therein declared to prevail against the owner of such grain and "any and all liens, charges, encumbrances, conveyances and claims whatsoever" (46).

The right of retention of the grain by the thresher is effectually asserted when the person entitled to such right

(a) declares either verbally or in writing his intention of holding such grain, or

(b) does any act or uses any language indicating that he has taken or retained or is about to take or retain possession of such grain (47).

(44) Stat. Man. 1894, c. 36, ss. 1, 2.

(45) Stat. Man. 1894, c. 36, s. 3; Stat. Man. 1896, c. 30.

(46) 57 Vict. (Man.) c. 36, s. 4.

(47) 57 Vict. (Man.) c. 37, s. 6.

And any person who

(a) Takes or endeavors to take the grain out of the custody or control of the person asserting such right of retention, or

(b) Endeavors to prevent or prevents such person from exercising his statutory right of retention, or

(c) Prevents or endeavors to prevent the person entitled to and asserting such right from exercising any of the rights conferred by the statute,

is liable, upon summary conviction before two justices of the peace, to be fined not less than \$20 nor more than \$100 together with the costs of prosecution, and in default of payment is liable to three months' imprisonment (48).

The person entitled to and asserting a threshers' lien may forthwith house or store the grain in his own name, and if, at the expiration of 5 days from the time when the right of retention is asserted by the person entitled to the same, the price or remuneration for which the grain is held as security be not paid, the lien holder may sell the grain 'at a fair market price' and the proceeds are to be applied, first, in payment of the reasonable cost of transporting the grain to market; next, in payment of the price or remuneration for threshing; and the balance is to be paid on demand to the owner of the grain or to his assigns.

The grain retained as security must in all cases be sold within 30 days after the right of retention is asserted, unless the owner thereof consents in writing to the same being held unsold for a longer time (49).

(48) 57 Vict. (Man.) c. 36, s. 6.

(49) 57 Vict. (Man.) c. 36, s. 5.

CHAPTER XVI.

LANDLORD'S LIEN BY DISTRESS.

Nature of the right of distress.—A distress upon goods and chattels, whether the right is conferred by the common law or by statute or is created by contract, involves the holding of possession of the chattels for the purpose of enforcing the money demand in a manner similar to ordinary common law liens. The right of distress alone does not constitute a lien on the goods, but the distress, when actually made, constitutes a lien upon the goods.

A distress does not take out of the debtor the property in the goods (1), and the sheriff may make a qualified seizure subject to a distress for rent under which the landlord's bailiff is already in possession, and the placing of an execution in the sheriff's hands binds the goods subject to such distress (2). Formerly a landlord could not distrain after his interest in the estate had expired (3); but now by statute in Ontario (3*a*), it is rendered unnecessary that the relation of landlord should depend upon tenure or service, or upon the continuance of the landlord's reversion (4); but the common law right of distress is not taken away by the Act (5).

(1) *Macdonald v. Cummings* (1892) 8 Man. R. 406.

(2) *Macdonald v. Cummings* (1892) 8 Man. R. 406.

(3) *Hartley v. Jarvis* 7 U.C.R. 545; *Lewis v. Brooks* 8 U.C.R. 576.

(3*a*) Landlord and Tenant Act (Ont.) R.S.O. 1897, c. 170, s. 3.

(4) *Harpelle v. Carroll* 27 Ont. R. 240.

(5) *Ibid.*

Landlord's distress for rent.—A distress for rent is the taking without legal process of cattle or goods as a pledge to compel satisfaction of the amount of the landlord's demand (6).

The rent due from a tenant to a landlord is a "rent-service" to which is incident a right of distress. A distress may also be given by agreement of the parties which will be effective as to premises held under another landlord by the party granting such right so far as concerns goods belonging to the granting party, but not as to goods of others (7). A rent in kind, *ex. gr.* a half share of the wheat grown on the demised premises, may be lawfully distrained for (7*a*).

The making of a distress for rent suspends the right of action, and a concurrent attachment issued therefor will be set aside (8), and when rent is attached by garnishee process against the landlord, the collateral remedy by way of distress is thereby suspended (9). Where a landlord has distrained for arrears of rent goods upon the demised premises, part of which belong to the tenant and part to a third person whose goods by reason of his being a sub-tenant or otherwise are liable to be distrained, such third person has no right to compel the landlord to first sell the part belonging to the tenant and apply the proceeds on the rent before realizing on the goods of the third party (10).

If the tenant has a claim for debt against the landlord he may, in Ontario, set-off the same against the

(6) *Hunter's Distress for Rent* (1896) 2nd ed. 26.

(7) *Re Roundwood Colliery Co.* (1897) 1 Ch. 373.

(7*a*) *Dick v. Winkler* (1899) 35 Can. Law Jour. 652.

(8) *Gray v. Curry* (1890) 22 N.S.R. 262.

(9) *Patterson v. King* 27 Ont. R. 56.

(10) *Pegg v. Starr* (1892) 23 Ont. R. 83.

rent, either before or after distress, by giving a written notice of his intention to do so ; in which case the landlord will be entitled to distrain for the balance only of the rent after deducting the debt (11). The service by the tenant, after distress but before the sale, of a notice of set-off, pursuant to R.S.O. (1897) c. 170, s. 33, of an amount in excess of the rent, to which the tenant is entitled, does not, however, make the distress illegal (12).

An Ontario statute provides that in case of an assignment for the general benefit of creditors the preferential lien of the landlord for rent shall be restricted to "arrears of rent due during the period of one year last previous to, and for *three months following*, the execution of such assignment, and from thence so long as the assignee shall retain possession of the premises leased" (13).

A lease under which the rent was payable quarterly in advance contained a provision that if the lessees should make an assignment for the benefit of creditors, the then current and next ensuing quarters' rent and the current year's expenses, taxes, etc., should immediately become due and payable as rent in arrear, and recoverable as such. The lessee made an assignment, and it was held that the lessor was entitled to recover, in addition to a quarter's rent due and in arrear for the quarter preceding the making of the assignment, the current quarter's rent, being the quarter during which the assignment was made, which was also due and in arrear, as well as a further quarter's rent,

(11) R.S.O. 1897, c. 170, s. 33.

(12) *Brillinger v. Ambler* (1897) 28 Ont. R. 368.

(13) R.S.O. c. 170, sec. 34, s.-s. 1 ; and see 35 C.L.J. (1899) 261.

together with the taxes for the current year (14). But a landlord has no preferential lien against the insolvent's estate, if there be no distrainable goods on the premises at the time of the assignment (15).

A distress made by an agent in his own name for the benefit of his principal, and subsequently ratified by the latter, has been held to be valid (16). If rent be made payable in advance, the landlord may distrain at the commencement of the term (17). The tenant is entitled to the whole of the day upon which the rent falls due within which to make payment, and in consequence a distress cannot be legally made until the day following (18).

A distress more than six months after the expiration of the tenancy is illegal, and a continuation of the tenancy will not necessarily be implied from the mere fact of the party remaining in possession (19).

A person entitled to distraint for an entire demand cannot split it so as to justify making more than one distress therefor if upon the first distress there was more than enough of goods distrainable which might

(14) *Tew v. Toronto* (1898) 30 Ont. R. 76, 35 C.L.J. 112 (Ferguson, J.); *Langley v. Meir* (1898) 25 Ont. App. 372, 34 C.L.J. 467; *Lasier v. Henderson* (1898) 29 Ont. R. 673, 34 C.L.J. 698 commented on.

(15) *Magann v. Ferguson* (1898) 29 Ont. R. 235; *Langley v. Meir* (1898) 25 Ont. App. 372; *Lasier v. Henderson* (1898) 29 Ont. R. 673, 34 C.L.J. 698.

(16) *Grant v. McMillan* 10 U.C.C.P. 536.

(17) *Galbraith v. Fortune* 10 U.C.C.P. 109; *Lee v. Smith* 9 Ex. 663.

(18) *Sinclair's Landlord and Tenant* (Ont.) 40.

(19) *Soper v. Brown* 4 U.C.O.S. 103; *Strathy v. Crooks* 6 U.C.O.S. 587; *Dick v. Winkler* (1899) 35 Can. Law Jour. 652; Stat. 8 Anne c. 14.

have been taken if the distrainer had then thought proper (20).

Distress after termination of tenancy.—Under the statute 8 Anne c. 14, ss. 6, 7, the landlord may distrain for arrears of rent due upon any lease ended or determined, after the determination of the lease, in the same manner as he might have done if it had not been ended or determined, provided such distress be made within six calendar months after the determination of the lease and during the continuance of the landlord's title or interest and during the possession of the tenant from whom the rent became due. If nothing has been done by way of extending the tenancy or creating a new lease, a seizure will be illegal if made more than six months after the termination of the tenancy, although the tenant had remained in possession (20a). The holding over need not be tortious, and if the landlord permits the tenant to hold over as to part of the premises, he may distrain on that part for the arrears of rent due for the whole property demised (21). There must, however, be possession by the same tenant, and if a new tenant has been given possession by the landlord, chattels left behind by the former tenant cannot be distrained (22).

The power conferred by the statute 11 Geo. II. c. 19 of following and seizing, within 30 days after their removal, the goods of the tenant which the latter,

(20) Oldham and Foster on Distress 258.

(20a) *Dick v. Winkler* (1899) 35 Can. Law. Jour. 652.

(21) *Nuttall v. Staunton* 4 B. & C. 51.

(22) *Taylorson v. Peters* 7 Ad. & E. 110.

has fraudulently or clandestinely taken away from the demised premises, applies only where they would have been liable by law to distress had they remained on the premises, and therefore cannot be exercised after the termination of the tenancy and after the possession of the tenant in respect of the premises demised has ceased (23).

Distress by landlord's executors.—The executors or administrators of any lessor or landlord may distress upon the lands demised for any term or at will, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done if living (24).

Such arrears may be distrained for at any time within six months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears became due; and the powers and provisions contained in the several statutes relating to distress for rent shall be applicable to distresses so made (25).

Distress of goods fraudulently removed.—By 11 Geo. II. c. 19, it is enacted that if any tenant of any lands or tenements upon the demise or holding whereof any rent is reserved shall fraudulently or clandestinely convey away from the demised premises *his goods or chattels* to prevent the landlord distraining for arrears of rent, it shall be lawful for the landlord, or any person by him for that purpose lawfully empowered, within 30 days next ensuing the carrying away of the goods, to seize the same wherever they

(23) *Gray v. Stat* 11 Q.B.D. 668.

(24) The Trustee Act, R.S.O. 1897, c. 129, s. 13.

(25) R.S.O. 1897, c. 129, s. 14.

shall be found, as a distress for the rent (26); and he may sell and dispose of them as if they had been actually distrained upon the demised premises, provided they have not, before the seizure, been sold *bona fide* and for a valuable consideration to a person ignorant of the fraud (27). The landlord or his bailiff may break into a building or enclosure in the day time to seize the goods, first calling to his assistance a constable or peace officer; but before breaking into a dwelling house oath must be made before a justice of the peace that there is good ground to suspect that such goods are in the dwelling house (28).

The statute applies only where the goods alleged to have been fraudulently or clandestinely removed are the tenant's own property (29); and goods which are the property of a stranger cannot be followed even although the tenant has an equity of redemption in them (30).

In order to bring the case within the statute relating to fraudulent or clandestine removal the rent must have accrued due before or at the time of the removal (31); but it need not have been in arrear if it were due; and so where a tenant fraudulently removed his goods on the morning of the day when the rent came due, with intent to avoid a distress, the landlord was held to be justified under the statute, in following the goods the next day and seizing them as

(26) 11 Geo. II. c. 19, s. 1.

(27) Sec. 2.

(28) Sec. 7.

(29) *Martin v. Hutchinson* 21 Ont. R. 388.

(30) *Tomlinson v. Consolidated Credit* 24 Q. B. D. 135.

(31) *Rand v. Vaughan* 1 N.C. 767.

a distress (32). The removal need not be secret if it be fraudulent, the words of the statute being "fraudulently or clandestinely."

Whether the removal was fraudulent or not is a question of fact within the province of a jury to determine (33); but it would seem that if the effect of the removal is to leave no sufficient distress on the premises, that will be evidence of fraud (34).

Exemptions from distress.—The following articles are by the common law absolutely privileged from being distrained for rent (35).

1. Fixtures and other things which cannot be restored in the same plight as taken.
2. Animals *feræ naturæ*.
3. Goods delivered to a person exercising a public trade, to be carried, wrought, worked up or managed in the way of his trade or employ (36). So goods of a principal in the hands of a factor for sale are privileged from distress for rent due from such factor to his landlord, on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption from a landlord's general right to distrain (37).

(32) *Dibble v. Bowater* 2 E. & B. 564, 22 L.J.Q.B. 396.

(33) *John v. Jenkins* 1 Cr. & M. 227.

(34) *Opperman v. Smith* 4 D. & Ry. 33; *Parry v. Duncan* 7 Bing. 243; Roscoe N.P. 16th ed. 1072.

(35) Woodfall on Landlord and Tenant 16th ed. 468.

(36) *Simpson v. Hartopp* Willes Rep. 512.

(37) *Gilman v. Elton* 23 R.R. 567.

4. Things in actual use, as the horse on which a man is riding or a fish net in a man's hand, or, tools of trade in actual use at the time ; the reason of this rule being because of the danger to the public peace were such distresses allowed (38).

5. Goods in the custody of the law ; " for it would be repugnant that it should be lawful to take goods out of the custody of the law " (39).

6. The goods of an ambassador (40).

Both under the common law and by statute, 51 Hen. 3, stat. 4, a man shall not " be distrained by his beasts that gain his land, nor by his sheep, while there is another sufficient distress to be found, except for damages feasant " (41). But beasts of the plough may be distrained if the only other subject of distress is growing crops, because the landlord is entitled to distrain whatever is immediately available and to hold the growing crops for the residue (42).

Tools of trade not in actual use at the time of the distress so as to be absolutely privileged, are yet privileged in case there is sufficient other distress on the premises (43).

Where a gas stoker hired a sewing machine and his wife, a seamstress, used the machine and applied the earnings so acquired for the maintenance of the household, it was held that the sewing machine was an

(38) Woodfall's Landlord and Tenant 16th ed. (1898) 476.

(39) Co. Lit. 47a.

(40) *Parkinson v. Potter* (1885) 16 Q.B.D. 152 ; *Novello v. Toogood* (1823) 25 R.R. 507 ; Stat. 7 Anne c. 12, s. 3.

(41) *Davies v. Aston* 1 C.B. 746.

(42) *Piggott v. Birtles* 1 M. & W. 441.

(43) *Nargett v. Nias* 28 L.J.Q.B. 143.

"implement of trade" of the gas stoker and so was exempt under an English statute (44).

Neither the cut grain nor growing crops could be distrained upon at common law, but by 2 W. & M. sess. 1, c. 5, s. 3. "Any person having rent in arrear and due upon any demise, lease or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with such rent, and lock up or detain the same in the place where the same shall be found for or in the nature of a distress until the same shall be replevied or sold, but the same must not be removed from such place to the damage of the owner."

By the Distress for Rent Act 11 Geo. II., c. 19, secs. 8 and 9, the landlord is authorized to take and seize as a distress for rent, "all sorts of corn and grass, hops, roots, fruits, pulse or other product whatsoever" i.e. ejusdem generis (45), growing on the land demised.

The landlord exercising the statutory right of seizing growing crops could not under that statute sell them until he had harvested the crop, before which time an appraisalment could not legally be made of them; but this has been varied in Ontario by statute (46) under which it is enacted that when growing or standing crops, which may be seized and sold under execution, are seized for rent, they may, at the option of the landlord or upon the request of the tenant, be advertised and sold in the same manner as other

(44) *Churchward v. Johnson* (1889) 54 J.P. 326.

(45) *Clark v. Gaskarth* 8 Taunt. 431.

(46) R.S.O. 1897, c. 170.

goods, and it shall not be necessary for the landlord to reap, thresh, gather or otherwise market the same (46a).

Any person purchasing a growing crop at such sale, will be liable for the rent of the lands upon which the same is growing at the time of the sale, and until the crop shall be removed, unless the same has been paid or has been collected by the landlord, or has been otherwise satisfied, and the statute declares that the rent shall, as nearly as may be, be the same as that which the tenant whose goods were sold was to pay, having regard to the quantity of land and to the time during which the purchaser shall occupy it (47).

The actual user of goods, of whatever kind exempts them from seizure either by distress or otherwise, and whether, in the case of distress, there be a sufficiency or not of other liable goods on the premises (48). It is illegal to distrain sheep for rent when there are other chattels upon the premises sufficient to satisfy the claim (49).

Exemptions under Ontario statute. By statute in Ontario (50) such of the tenant's goods and chattels as are exempt from seizure under execution are also exempt from a landlord's distress, but with the proviso that "in the case of a monthly tenancy the said exemption shall only apply to two month's arrears of rent." The effect of this proviso was considered in a recent case in the County Court at Toronto and it

(46a) Sec. 36.

(47) Sec. 37.

(48) *Miller v. Miller* 17 U.C.C.P. 226.

(49) *Hope v. White* 22 U.C.C.P. 5.

(50) R.S.O. 1897, c. 170, s. 30.

was held by McDougall, Co. J., that it was impossible to say from the language used therein what limitations the legislature intended to put on a monthly tenant's right to exemption where more than two months' rent was in arrear under a monthly tenancy, and the proviso was held inoperative by reason of its indefiniteness (51).

Where an exemption is claimed on the ground that the goods are not liable to seizure under execution, the person claiming the exemption must select and point out the goods and chattels claimed to be exempt (52).

By the same statute it is enacted as follows :

A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are on the premises; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise, nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the

(51) *Harris v. Canada Permanent* (1898) 34 Can. Law Jour. 39, followed in *Shannon v. O'Brien* 34 Can. Law Jour. 421 (Snider, Co. J. of Wentworth); but see article 34 C.L.J. (1898) 440.

(52) R.S.O. 1897, c. 170, s. 30 (3).

tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase gift, transfer or assignment from any relative to whom such restriction does not apply (53).

The word "tenant" as used in the section is to extend to and include the sub-tenant and the assigns of the tenant and any person in actual occupation of the premises under or with the assent of a tenant during the currency of the lease or while the rent is due or in arrear whether he has or has not attorned to or become the tenant of the landlord (54); but is not to extend to boarders or lodgers as to whom special provisions are made by another section of the statute (55); but persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees and without authority to let or grant possession of them are not in occupation "under" the tenant and their goods are not liable to distress (56).

The exemption of stranger's goods is not, however, to apply so as to exempt from seizure by distress goods or merchandise in a store or shop managed or controlled by an agent or clerk for the owner of such goods or merchandise when such clerk or agent is also the tenant and in default, and the rent is due in respect of the store or shop and premises rented therewith and thereto belonging, when such goods would have been liable to seizure but for the Act (57).

(53) Sec. 31 (1).

(54) Sec. 31 (3).

(55) Sec. 39.

(56) *Farwell v. Jameson* (1896) 26 Can. S.C.R. 588.

(57) R.S.O. 1897, c. 170, s. 31 (2).

The tenant who is in default for non-payment of rent and claims the benefit of the exemption from distress under the Act, must give up possession of the premises forthwith, or be ready and offer to do so (58) or his goods may still be seized and sold for the rent. The offer to give up possession may be made to the landlord or to his agent; and the person authorized to seize and sell the goods and chattels, or having the custody thereof for the landlord, is to be considered an agent of the landlord for the purpose of the offer and surrender to the landlord of the possession (59). If the landlord after default has been made in the payment of rent and before or at the time of seizure, serve the tenant with a notice informing him of the amount claimed for rent in arrear, and that in default of payment, if he gives up possession of the premises to the landlord within 3 days after service of the notice, he will be entitled to claim exemption for such of his goods and chattels as are exempt from seizure under execution, but that, if he neither pays the rent nor gives up possession, his goods and chattels will be liable to seizure, and will be sold to pay the rent in arrear and costs, the tenant must vacate the premises within the 3 days or the landlord will have the right to distrain upon the goods notwithstanding that they would be exempt from seizure under execution (60).

The notice may be in the following form or to the like effect (61):

Take notice that I claim \$ for rent due to me in respect of the premises which you hold as my tenant, namely, (*hereby briefly describe them*); and unless the said rent is paid, I demand from you immediate possession of the said premises; and I am ready to leave

(58) R.S.O. 1897, c. 170, s. 32 (1).

(59) Sec. 32 (2).

(60) Sec. 32 (3).

(61) R.S.O. 1897, c. 170, s. 32 (4).

in your possession such of your goods and chattels as in that case only you are entitled to claim exemption for.

Take notice further, that if you neither pay the said rent nor give me up possession of the said premises within three days after the service of this notice, I am by law entitled to seize and sell and I intend to seize and sell all your goods and chattels, or such part thereof as may be necessary for the payment of the said rent and costs.

This notice is given under the Act of the Legislature of Ontario, respecting the Law of Landlord and Tenant.

Dated this day of A.D.
(Signed) A.B. (landlord).

To C.D. (tenant)

The notice need not be served personally and the service will be good if it be left 'with some grown person being in, and apparently residing on, the premises occupied by the person to be served' (62), and if the tenant cannot be found and his place of abode is either not known, or admission thereto cannot be obtained, the posting up of the paper on some conspicuous part of the premises, shall be deemed good service (63).

Exemption of lodger's goods Ontario. Under the Ontario Landlord and Tenant Act (64) if a superior landlord shall levy or authorize to be levied a distress on any furniture, goods or chattels of any boarder or lodger for arrears of rent due to the superior landlord by his immediate tenant, the boarder or lodger may serve the superior landlord, or the bailiff or other person employed by him to levy the distress, with the statutory declaration (made in accordance with the Canada Evidence Act) of the boarder or lodger, setting forth: (a) that the immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained

(62) Sec. 32 (6).

(63) Sec. 32 (7).

(64) R.S.O. 1897, c. 170, s. 39.

upon : (b) that such furniture, goods or chattels are the property or in the lawful possession of such boarder or lodger ; (c) whether any and what amount by way of rent, board or otherwise is due from the boarder or lodger to the immediate tenant ; (d) to such declaration shall be annexed a correct inventory, subscribed by the boarder or lodger, of the furniture, goods and chattels referred to in the declaration.

The boarder or lodger may pay to the superior landlord, or to the bailiff or other person employed by him, the amount due, if any, or so much thereof as is sufficient to discharge the claim of the superior landlord.

If the superior landlord, or a bailiff or other person employed by him, after being served with the declaration and inventory, and after the boarder or lodger shall have paid or tendered to him the amount, if any, which the boarder or lodger is so authorized to pay, shall levy or proceed with a distress on the furniture, goods or chattels of the boarder or lodger, the superior landlord, and his bailiff will be deemed guilty of an illegal distress, and the boarder or lodger may replevy such furniture, goods or chattels in any court of competent jurisdiction, and the superior landlord will also be liable to an action at the suit of the boarder or lodger, in which action the truth of the declaration and inventory may be inquired into (65).

Any payment made by a boarder or lodger to the superior landlord pursuant to the Act shall be deemed a valid payment on account of the amount due from him to the immediate tenant (66).

Form of Distress. The entry upon the premises for the purpose of distraining must be made in the

(65) R.S.O. 1897, c. 170, s. 40.

(66) Sec. 41.

usual manner adopted by persons having access to the building, as by turning the key, lifting the latch or drawing back the bolt (67). It is illegal to effect the entry by breaking open the outer door or gate (68); or by opening a closed window, whether fastened or not (69); but the entry will be legal if made through an *open* window, although it was necessarily opened further by the bailiff to enable him to get into the house (70). If the premises are enclosed by a high wall intended to keep people out, and constituting a serious obstacle to their getting in, it will be illegal for the bailiff to obtain access to the premises by getting over the wall (71); but to climb over an ordinary fence and so gain access to an open door of the house is not illegal (72).

A landlord on the day of the removal of the goods by the tenant forbade the removal of same until the rent in arrear was paid, and seized the same afterwards upon the highway. It was held that there had been by such notice a sufficient inception of a distress to justify the subsequent seizure on the highway (73).

An entry by a bailiff under a distress warrant for rent must be through the ordinary and natural means of ingress to the place where the distress is about to be made (74). And where a sub-tenant has an

(67) *Ryan v. Shilock* 7 Exch. 72.

(68) *Brown v. Glenn* 16 Q.B. 254; *Attack v. Bramwell* 32 L.J.Q.B. 146, 3 B. & S. 520.

(69) *Hancock v. Austin* 14 C.B.N.S. 634; *Nash v. Lucas* L.R. 2 Q.B. 500.

(70) *Crabtree v. Robinson* 15 Q.B.D. 312.

(71) *Scott v. Buckley* 16 L.T.N.S. 573.

(72) *Eldridge v. Stacey* 15 C.B.N.S. 458.

(73) *Pulver v. Yerex* 9 U.C.C.P. 270.

(74) *Anglehart v. Rathier* 27 U.C.C.P. 97.

apartment with a separate outer door, it is illegal for the superior landlord to break into that apartment to make a distress (75).

Goods which are not the tenant's property cannot be followed and distrained off the premises, although clandestinely removed by the tenant (76). A distress was held to have been validly made where the bailiff entered and made an inventory of "the several goods and chattels distrained by me, viz.: in front shop, quantity of millinery together with sundry articles on the premises," the tenant having then given to the bailiff a receipt or undertaking whereby he acknowledged to have received all the goods and chattels in the house, 'seized for rent' and agreed that they should be delivered up when demanded (77).

Cattle may be taken on the highway as a distress if they have been driven off the demised premises in the view of the bailiff executing the warrant (78). But where the lessee's mare and yoke of oxen, the subject of the distress, had strayed off the demised premises on to the lessor's land adjoining, and the bailiff then and before making a seizure served the lessee with a notice of distress, and taking a bridle from the lessor's stable he and the lessor and one L. went to the place where the mare and oxen were, off the demised premises, and the bailiff having put the bridle on the mare, the mare and oxen were taken to the lessee's premises and a yoke was there put upon the oxen; it was held that there was evidence to go to the jury that the distress was made off the demised premises, and was therefore illegal (79).

(75) *McArthur v. Walkley* (1841) Rob. & Jos. Ont. Digest 1084.

(76) *Martin v. Hutchinson* 21 Ont. R. 388.

(77) *Black v. Coleman* 29 U.C.C.P. 507.

(78) *Halsted v. McCormick* (1840) Rob. & Jos. Ont. Dig. 1087.

(79) *Peacey v. Ovas* 26 U.C.C.P. 464 (Hagarty C.J. diss.).

If the bailiff has been in peaceable possession under a distress, and is afterwards expelled from the premises by force, or induced to leave by fraud, but does not abandon the distress, he will be justified in forcibly regaining possession of the goods, and may break open the outer door of the premises for that purpose (80).

Holding possession of goods distrained.—By 11 Geo. II., c. 19, s. 10, it was enacted that any person lawfully taking a distress for any kind of rent may impound or otherwise secure the distress of what nature or kind soever in such place or on such part of the premises chargeable with the rent as shall be most fit and convenient for the same, and may appraise sell and dispose of it as might before have been done in the case of a distress taken off the premises.

A distress is sufficiently impounded in accordance with the statute where, with the consent of the tenant, the person distraining makes an inventory of part of the goods distrained, serves it, together with notice of distress, on the tenant and leaves a man in possession on the premises, but does not disturb, lock up or remove any of the goods (81). The landlord of certain premises distrained for rent in arrear, and did everything required for impounding the goods on the demised premises within the meaning of 11 Geo. II., c. 19, s. 10, and a man was left in possession. On a Saturday night and without any reasonable necessity this man left the premises and did not return until the following Monday. In the meantime the defendant, who was the true owner of the goods, entered the premises and seized and removed the same. It was

(80) *Eagleton v. Gutteridge* 11 M. & W. 465; *Bannister v. Hyde* 2 E. & E. 627, 29 L.J.Q.B. 141; *Boyd v. Profaze* 16 L.T.N.S. 432.

(81) *Johnson v. Upham* (1859) 2 E. & E. 250.

held that actual possession was not necessary to preserve the landlord's right to the goods, and that they were in custodia legis; and there being no intention on the part of the landlord to abandon the distress, it was not necessary that the man should continue in actual and visible possession (82).

Delay in the sale of goods distrained for rent does not prejudice the distress, if there be no fraud or collusion between the landlord and tenant to defeat the rights of third parties. And where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond or undertaking from the tenant to the bailiff to produce to and keep for the bailiff the chattels and crops, and to deliver them to him and not to remove, or allow them to be removed from the premises, but to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary (83).

Inventory and notice of distress.— Before the passing of the statute 2 Wm. & Mary, c. 5, distress was merely a pledge to be held until the rent was paid, but by sec. 2 of that statute it was enacted that "where
"any goods or chattels shall be distrained for any rent
"reserved and due upon any demise, lease or contract
"whatsoever, and the tenant or owner of the goods so
"distrained shall not *within five days next after* such
"distress taken, and notice thereof (with the cause of
"such taking) left at the chief mansion house or other
"most notorious place on the premises charged with
"the rent distrained for, replevy the same with suffi-
"cient security to be given to the sheriff according to

(82) *Jones v. Biernstein* (1899) 1 Q.B. 470.

(83) *Anderson v. Henry* (1898) 34 Can. Law Jour. 742 (Ont.); *McIntyre v. Stata* 4 U.C.C.P. 248; *Roe v. Roper* 26 U.C.C.P. 76, and *Whimsell v. Giffard* 3 O.R.1, distinguished; *Langtry v. Clark* 27 Ont. R. 280 distinguished.

"law, that then in such case, *after* such distress and
"notice as aforesaid, and expiration of the said *five*
"days, the person distraining shall and may, with the
"sheriff or undersheriff of the county or with the con-
"stable of the hundred, parish or place, where such
"distress shall be taken (who are required to be aiding
"and assisting therein), cause the goods and chattels
"so distrained to be appraised by two appraisers
"(whom such sheriff, undersheriff or constable are
"hereby empowered to swear) to appraise the same
"truly, according to the best of their understandings,
"and after such appraisement shall and may lawfully
"sell the goods and chattels so distrained, for the best
"price that can be gotten for the same, towards satis-
"faction of the rent for which the said goods and
"chattels shall be distrained, and of the charges of
"such distress, appraisement and sale, leaving the
"overplus (if any) in the hands of the said sheriff,
"undersheriff or constable, for the owner's use."

The notice of distress under 2 W. & M., c. 5, s. 2, is for the purpose of informing the tenant or the person whose effects are taken what goods are distrained, and the amount of rent in arrears (84), and it must be in writing (85); but a notice of distress specifying certain goods and purporting to include "all other goods that may be required to satisfy the rent" is too vague and uncertain to justify a sale of stranger's goods deposited on the premises and not specifically mentioned in the notice (86).

The fact that the tenant, on being informed by the bailiff of the time in which he may redeem the goods, said that he did not require an inventory of same will

(84) *Kerby v. Harding* 6 Exch. 234.

(85) *Wilson v. Nightingale* 8 Q.B. 1034.

(86) *Kerby v. Harding* 6 Exch. 234.

not constitute a waiver of the notice of distress which the law requires to be given before a sale can be legally made (87).

A notice of distress given on the 8th for the 12th of the same month is invalid (88). The notice is only required to enable the landlord to take advantage of the statutory power of selling the distress, and the distress itself is good although no notice be given (89).

Appraisement of goods distrained.—The *five days* specified in the statute (90) are to be reckoned exclusively both of the day when notice of distress, *i.e.*, the inventory with a notice of distress subjoined, is given and the date of the sale (91). The appraisers must be parties disinterested in the distress and neither the landlord or his bailiff can act as appraiser (92). It is doubtful whether a tenant can waive the statutory formalities as to inventory, appraisement, sale etc., as regards mortgagees of any of the goods seized or other persons having a title interest therein (93). The fact of swearing the appraiser, after the making of the appraisement is a mere irregularity, and is a ground for damages only, and does not render the distress and subsequent proceedings invalid (94). The appraisers chosen should be reasonably competent men but not

(87) *Shultz v. Reddick* 43 U.C.R. 155.

(88) *Schultz v. Reddick* 43 U.C.R. 155.

(89) *Trent v. Hunt* 9 Exch. 14; *Lucas v. Tarleton* 3 H. & N. 116.

(90) 2 Wm. & M. c. 5.

(91) *Lynch v. Bickle* 17 U.C.C.P. 549; *Robinson v. Waddington* 15 Q.B. 753.

(92) *Oldham & Foster on Distress* (1886) 223.

(93) *Whimsell v. Giffard* (1883) 3 Ont. R. 1.

(94) *Plaxton v. Barrie* (1899) 35 Can. Law Jour. 611 (Ont.).

necessarily professional appraisers (95). And the bailiff or other person concerned in making the distress must not act as an appraiser therein (96).

Landlord's right of sale.—The landlord is not bound to sell the goods distrained but may still hold them in pledge as before the statute, 2 W. & M. c. 5, s. 2 (97); but unless he removes the goods from the tenant's premises (if there impounded) within a reasonable time after the five days allowed to the tenant to replevy, he may be deemed a trespasser for keeping them there (98). There must be five clear days between the notice of distress and the sale, but the landlord is allowed a reasonable time after the five days to sell, and what is a reasonable time is a question for the jury (99).

Ordinarily a landlord takes no title under a sale by his own bailiff acting upon a distress for rent, and, as the distress is then at an end and the goods no longer in the custody of the law, the landlord cannot set up a lien for the rent as against an owner of the chattels other than the tenant (100). Although the general rule is that no one can sustain the double character of seller and buyer, yet where the landlord at the sale of the goods distrained bought some of the chattels with the tenant's consent, it was held that the property in them passed (101).

(95) *Allen v. Flicker* 10 Ad. & E. 640; *Roden v. Eyton* 6 C. B. 427.

(96) *Westwood v. Cowne* 1 Stark. 172; *Lyon v. Weldon* 2 Bing. 336.

(97) *Philphott v. Lehain* 35 L.T. (Eng.) 855.

(98) *Griffin v. Scott* 2 Ld. Raym. 1424; *Pitt v. Shaw* 4 B. & Ad. 206.

(99) *Lynch v. Bickle* 17 U.C.C.P. 549.

(100) *Williams v. Grey* 23 U.C.C.P. 561.

(101) *Woods v. Rankin* 18 U.C.C.P. 44.

Abandonment, withdrawal or waiver.—The right of distress may be waived as to any specified goods by agreement of the landlord with the conditional vendors of same, in cases where, by the provincial law, goods not the property of the tenant are notwithstanding liable to distress (102).

A landlord cannot, after abandoning a seizure, make a second distress for the same rent (103).

Where a landlord, with a view of securing rent due to him by one Scott, purchased some of Scott's furniture from Scott's wife in his absence, applying the rent upon the purchase money, and removed the goods from the demised premises to his own, it was held that his right to distrain as against a chattel mortgagee from Scott had ceased on the removal of the goods (104).

A second distress for the same rent is illegal where the first has been voluntarily abandoned by the landlord, but it is not a voluntary withdrawal if an arrangement is made, at the request of the tenant, whereby he should have further time to pay, and, on his making default by not paying as arranged, the landlord may distrain a second time (105). And the landlord's claim for priority to the extent of one year's rent against an execution creditor is not impaired by a withdrawal of the distress, at the request of, and for the accommodation of, the tenant (106).

If the distrainor, or anyone by his direction, make

(102) *Wallace v. Fraser* 2 Can. S.C.R. 522.

(103) *Lyness v. Sifton* 13 U.C.C.P. 19; *May v. Severs* 24 U.C.C.P. 396.

(104) *Fraser v. McFatridge* 13 N.S.R. 28.

(105) *Thwaites v. Wilding* 12 Q.B.D. 4, (C.A.); *Bagge v. Maraby* 8 Exch. 641.

(106) *Woolaston v. Stafford* 15 C.B. 278.

improper use of the thing distrained, the effect of his wrongful user of it is to justify the owner in reclaiming his property without being liable for a rescue (107); but where the tenant continued to use a hired piano distrained upon, which the landlord had left in the custody of the tenant's wife with directions not to allow its removal, it was held that such did not operate as an abandonment of the seizure (108).

The goods of a tenant, which had been mortgaged by him, were distrained for rent and impounded, and were left on the premises in his charge for over three weeks by agreement between him and the bailiff, when on being advertised for sale under the distress they were seized and taken away by the mortgagee. It was held that while there was a good distress and a good impounding as between the landlord and tenant, and while there was no abandonment between them, yet as between the landlord and the mortgagee the latter was entitled after the expiration of five days from the date of the distress, and after a reasonable time for the sale and disposal of the goods distrained had elapsed, to treat the goods as no longer in the custody of the law, but subject to his mortgage. It was also held that having taken possession of them under his mortgage, the mortgagee was not, under the circumstances, guilty of a pound breach under 2 Wm. & M. sess. 1, c. 5 (109).

Where the landlord withdrew a distress at the request and for the accommodation of the tenant on obtaining from him a chattel mortgage on his goods for the rent, but the tenant fraudulently concealed from the landlord that he had previously given a chattel

(107) *Smith v. Wright* 6 H. & N. 821.

(108) *Dimock v. Miller* (1897) 30 N.S.R. 74.

(109) *Langtry v. Clerk* 27 Ont. R. 280.

mortgage to another party covering most of the same goods, a second distress made after a seizure under the last mentioned mortgage was upheld (110). A landlord who receives a promissory note for rent and, by arrangement with the tenant, discounts it at the bank, is to be considered as having agreed that the right of distress shall be suspended until dishonour of the note (111).

British Columbia—Statutory provisions. By the British Columbia "Landlord and Tenant Act" (112) the rights of a landlord to distrain for rent owing to him by his tenant on goods in possession of the tenant sold to him under a duly filed agreement for hire, contract or conditional sale, is limited to 3 months' rent; and payment by the hirer or owner of such goods of the 3 months' rent, or so much thereof as will satisfy the landlord's claim, will discharge the claim of the landlord as against such goods (113).

A similar provision is made in this province for the protection of the goods of lodgers and boarders (114) as is contained in the Ontario statutes.

The British Columbia Landlord and Tenant Act contains a re-enactment as to that province of the statute 2 Wm. & M. c. 5, already referred to, under which the landlord is empowered to sell the goods distrained after due appraisement thereof and the expiry of 5 five clear days after the distress (115); and

(110) *Harpelle v. Carroll* 27 Ont. R. 240.

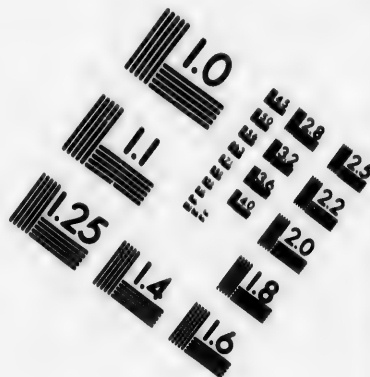
(111) *Simpson v. Howitt* 39 U.C.R. 610.

(112) R.S.B.C. 1897, c. 110.

(113) Stat. B.C. 1896, c. 18, s. 2; R.S.B.C. 1897, c. 110, s. 2.

(114) R.S.B.C. 1897, c. 110, s. 3.

(115) R.S.B.C. 1897, c. 110, ss. 6 *et seq.*



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also of the statute 11 Geo. II., c. 19 as to goods fraudulently removed to evade distress of same (116).

N. W. Territories—Statutory provisions.—The Distress for Rent Ordinance (117) contains the following enactment :

A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent although the same are found on the premises ; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant whether absolute or in trust or by way of mortgage or otherwise, nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase or by which he may or is to become the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant or by any other relative of his in case such other relative lives on the premises as a member of the tenant's family (117a).

This section is similar to the Ontario statute passed in 1894 (118) as it stood before the amendment of same in 1897 (119) by which it was further provided,

(116) R.S.B.C. 1897, c. 110, ss. 17 *et seq.*

(117) No. 7 of 1896 ; Con. Ord. N.W.T. 1898, c. 34.

(117a) No. 7 of 1896, s. 1 ; Con. Ord. N.W.T. 1898, c. 34, s. 4.

(118) 57 Vict. (Ont.) c. 43, s. 1.

(119) 60 Vict. (Ont.) c. 15, Schedule A. (60).

as to that Province, that any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom the restriction mentioned in the section is declared not to apply, shall not be entitled to claim exemption of the goods so acquired.

In the North-West Territories the statutory lien in favour of threshers for their charges authorizes them to retain a sufficient quantity of the grain to pay such charges where they are employed "at or for a fixed price or rate of remuneration" (119*a*); and such right of detention and the right of removing the grain for the enforcement of the lien will, if exercised forthwith after the threshing is finished (119*b*), prevail over a right of distress for rent reserved upon the land upon which the grain is threshed (119*c*).

Nova Scotia—Statutory provisions.—By the Tenancies and Distress for Rent Act of Nova Scotia (120), no distress for rent shall be made unless there be an actual demise at a specific rent (121).

Where any goods are distrained in Nova Scotia for rent reserved and due upon any lease or contract, and the tenant or owner of the goods shall not, within five days next after the distress taken and notice thereof with the cause of taking served upon him, or left at the most conspicuous place on the premises charged with such rent, replevy the same with security to be given to the sheriff, the landlord (with the sheriff or his deputy or a constable who are required to aid therein) may cause the goods so distrained to be

(119*a*) Con. Ord. N.W.T. 1898, c. 60.

(119*b*) Con. Ord. N.W.T. 1899, c. 11.

(119*c*) Con. Ord. N.W.T. 1898, c. 60, s. 3.

(120) R.S.N.S. 5th series, c. 125.

(121) Sec. 2.

appraised by two sworn appraisers who shall be sworn before a justice of the peace, the sheriff, his deputy, a constable or a commissioner (122).

The goods so distrained may be impounded or otherwise secured in such place or on such part of the premises chargeable with the rent as shall be most fit and convenient, and the landlord may appraise and sell and dispose of the same on the premises, after giving five days' public notice of such sale by handbills to be posted in at least five public places in the district in which such sale is to take place. But the landlord has the option of removing the goods to another place of impounding or security, and may sell, after due appraisal and notice, elsewhere than on the premises (123).

After the appraisement the landlord shall sell the goods distrained for the best price to be gotten therefor towards payment of the rent due and expenses incurred, leaving the surplus, if any, in the hands of the officer for the owner's use (124). Special provision is made by statute for the protection of lodgers' goods and for their release from distress made at the instance of the superior landlord upon payment to him of the amount due by the lodger to his immediate landlord (125).

All property brought upon or into any building used as a market *bona fide* for the purpose of sale by any person or persons, not being the property of the tenant or property in which the tenant is interested, is exempt from distress for rent (126).

(122) R.S.N.S. 5th series (1884), c. 125, s. 3.

(123) R.S.N.S. 5th series, c. 125, s. 4, N. S. Laws, 1886, c. 38, s. 1.

(124) R.S.N.S. 5th series, c. 125, s. 5.

(125) R.S.N.S. 5th series, c. 125, ss. 6 and 7.

(126) R.S.N.S. 5th series, c. 125, s. 9.

A statutory right is conferred upon a landlord to seize "any cattle or stock of his tenant feeding upon any common belonging to any part of the premises demised" and also "all sorts of corn, grain, grass, hops, roots, fruits, pulse or other product growing on any part of the premises demised," as a distress for arrears of rent and he may cut, gather, cure, carry and lay them up when ripe, in barns or other places on the premises so demised (127). In case there is no barn or proper place on the premises demised for receiving the same, then he may cause the same to be placed in any barn or proper place to be procured as near as may be to the premises, and "in convenient time" shall appraise and dispose of the same towards satisfaction of the rents and the charges of such distress as in other cases; but the appraisement is not to be made until after the crop is cut, cured and gathered (128). Notice of the place where the goods so distrained are deposited, shall within one week after their being so deposited, be given to the tenant or left at his last place of abode (129).

In Nova Scotia sheaves or cocks of grain, loose or in straw, hay in a barn or upon a hovel, stack or rick, or upon the land charged with such rent, may be locked up or detained upon the premises by a landlord having rent in arrear, for and in the nature of a distress until the same shall be replevied; and in default of being replevied may be sold after due appraisement; but the same shall not be removed out of the place where found and seized by the distrainer, to the damage of the owner, before such sale (130).

(127) R.S.N.S. 5th series, c. 125, s. 19.

(128) R.S.N.S. 5th series, c. 125, s. 20.

(129) R.S.N.S. 5th series, c. 125, s. 21.

(130) R.S.N.S. 5th series 1884, c. 125, s. 10.

A provincial statute also provides for cases of clandestine removal by an enactment in the following terms :—

“ In case any lessee of any messuage, lands or tenements, upon the demise whereof any rents are reserved, shall fraudulently or clandestinely convey from such demised premises his goods with intent to prevent the landlord distraining the same, such landlord, by himself or his servants, may, within 21 days then next ensuing such conveying away, seize such goods, wherever found, as a distress for such arrears of rent, and dispose of the same as if they had been distrained upon the premises, unless such goods shall have been sold in good faith and for a valuable consideration before such seizure, in which case they shall not be liable to a distress (131).

Executors or administrators of a deceased landlord may distrain for rent due in his lifetime, but if the term is ended the distress must be made within six months after its termination, &c. while the tenant continues to hold possession (132).

An irregularity or unlawful act done after the distress is made, by the distraining party or his agent, will not make the distress unlawful nor constitute the distraining party a trespasser *ab initio*, but will give rise to an action for damages only (133).

Manitoba — Statutory provisions.—By statute in Manitoba (134) the following restriction is placed upon the right of distress :—

“ A landlord shall not distrain for rent on goods and chattels the property of any person except the

(131) R.S.N.S. 5th series, c. 125, s. 15.

(132) R.S.N.S. 5th series, c. 125, s. 18.

(133) R.S.N.S. 5th series, c. 125, s. 13.

(134) 59 Vict. (Man.) 1896, c. 6.

"tenant or person who is liable for the rent, although
 "the same are found on the premises, but this restric-
 "tion shall not apply to crops or grain in favour of a
 "person claiming title under or by virtue of an
 "execution or attachment against the tenant, or in
 "favour of any person whose title is derived by
 "purchase, gift, transfer or assignment from the
 "tenant, whether absolute or in trust, or by way of
 "mortgage or otherwise, nor to the interest of the
 "tenant in any goods on the premises in the posses-
 "sion of the tenant under a contract for purchase, or
 "by which he may or is to become the owner thereof
 "upon performance of any condition, nor where goods
 "have been exchanged between two tenants or
 "persons by the one borrowing or hiring from the
 "other for the purpose of defeating the claim of or the
 "right of distress by the landlord, nor shall the
 "restriction apply where the property is claimed by
 "the wife, husband, daughter, son, daughter-in-law or
 "son-in-law of the tenant, or by any other relative of
 "his, in case such other tenant lives on the premises
 "as a member of the tenant's family" (135).

This provision is similar to that contained in the Ontario "Landlord and Tenant Act" (136) with the distinction that in Ontario the restriction is declared not to apply to *any* goods in favour of persons claiming title under an execution against the tenant, while in Manitoba the restriction is only declared not to apply to crops or grain as to claimants of that class, and with the further distinction that, in Ontario, words have been added to the section since its original enactment so as to make the further exception that the restriction of the right of distress shall not apply

(135) 59 Vict. (Man.) 1896, c. 6, s. 1.

(136) R.S.O. 1897, c. 170, s. 31 (1).

in favour of "any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom such restriction does not apply" (137).

The same privileges, rights and exemptions apply to persons leaving animals, furniture, vehicles and the gear thereunto belonging, to be kept, boarded or cared for at a livery, boarding or sale stable, as are made to apply to lodgers and boarders under the Manitoba Distress Act (138); and they will therefore be liable to be distrained upon for rent due by the stable keeper to his landlord, only to the extent of the charges due to the stable keeper in respect thereof (139).

If any superior landlord shall levy or authorize to be levied a distress on any furniture, goods or chattels of any boarder or lodger for arrears of rent due to such superior landlord by his immediate tenant, such boarder or lodger may serve such superior landlord or the bailiff or other person employed by him to levy such distress with a statutory declaration in writing made in accordance with the Canada Evidence Act by such boarder or lodger setting forth:

(a) That such immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon;

(b) That such furniture, goods or chattels are the property or in the lawful possession of such boarder or lodger, and

(c) What amount, if any, is due from the boarder or lodger to the immediate tenant for rent, board or otherwise (140).

(137) 60 Vict. (Ont.), c. 15 Sch. A. (60); R.S.O. 1897, c. 170, s. 31.

(138) R.S.M. 1891, c. 46.

(139) R.S.M. 1891, c. 91, s. 8.

(140) R.S.M. 1891, c. 46, ss. 5, 8.

A correct inventory of the goods is to be annexed to the declaration and to be signed by the boarder or lodger. Upon service of the statutory declaration he has the right to claim the release of his goods from the distress of the superior landlord on paying to him or his bailiff the amount, if any, due for board or lodging or such part as may be sufficient to discharge the claim distrained for. If the distress is proceeded with notwithstanding the service of the declaration, and after payment as aforesaid where the lodger or boarder is himself in arrear, he may replevy the goods (141).

Quebec Statutory provisions. The lessor has for the payment of his rent and other obligations of the lease a privileged right upon the movable effects which are found upon the property leased (142).

In the lease of houses the privileged right includes the furniture and movable effects of the lessee, and if the lease be of a store, shop, or manufactory, the merchandise contained in it. In the lease of farms and rural estates the privileged right includes everything which serves for the labour of the farm, the furniture and movable effects in the house and dependencies, and the fruits produced during the lease (143). The right includes also the effects of the undertenant in so far as he is indebted to the lessee (144). It includes also movable effects belonging to third persons, and being on the premises by their consent express or implied, for sums which have become due by the lessee prior to the notification given to the lessor of the property rights of third persons, or before

(141) R.S.M. 1891, c. 46, s. 6.

(142) Civil Code Que., art. 1619.

(143) Civil Code art. 1620.

(144) Civil Code 1621.

the knowledge acquired by the lessor of such rights of third persons, but not if such effects be only transiently or accidentally on the premises, as the baggage of a traveller in an inn, or articles sent to a workman to be repaired or to an auctioneer to be sold (145). The notification in due time to the lessor will avail against a subsequent acquirer of the leased premises (146).

The 'privilege' of the lessor extends to all rent that is due or to become due under a lease in authentic form. But in the case of the liquidation of property abandoned by an insolvent trader who has made an abandonment in favour of his creditors, the lessor's privilege is restricted to 12 months rent due and the rent to become due during the current year if there remain more than four months to complete the year; and if there remain less than four months to complete the year, to the twelve months' rent due and to the rent of the current year and the whole of the following year. If the lease be not in authentic form the privilege can only be claimed for three overdue instalments and for the remainder of the current year (147).

If a lessee fraudulently pledges his goods, so that the pledge might be annulled, the annulment would not give the lessor a right to seize after eight days from the time of their removal from the premises, and before judgment on a writ of *saisie-gagerie* (148). The landlord may exercise his right indiscriminately on all the goods on the tenant's premises, and cannot be compelled to reserve from sale until after other goods were realized upon, a piano the property in

(145) Civil Code 1622; 61 Vict. 1898 (Que.) c. 45.

(146) 61 Vict. (Que.) c. 45, s. 1.

(147) Quebec C.C. art. 2005, as amended (1898) 61 Vict. (Que.) c. 46, s. 1.

(148) *Cuddy v. Kamm* 9 Que. S.C. 32.

which was reserved to a third party upon a conditional sale agreement (149).

Where the lessee has made a judicial abandonment of his effects and the same are in the possession of a curator for the benefit of the creditors generally, the lessor is not entitled to cause them to be seized under a writ of *saisie-gagerie*, and the lessee as well as the curator may contest the writ (150).

When a third party has carried away some of the movables which formed part of the furnishings of a rented dwelling house, and refuses to point them out to a bailiff who has the execution of a writ of *saisie-gagerie* by right of mortgage, the landlord to whom rent is owing in respect of the dwelling may exercise his privilege upon such movables, and have them placed in legal custody for sale, by means of a writ of *saisie-arret* against the third party (151).

Where a piano is loaned to and left with a tenant by the owner in the hope of the tenant purchasing it, but without any hire-purchase contract, it is not subject to the lien for rent under Art. 1622 of the Quebec Civil Code (152). And the privileged right of the lessor upon the movable effects in the premises leased does not extend to an article (e.g. a piano) brought there by a person boarding with the tenant, and who owes nothing to the tenant for board, where the lessor had notice before the piano was placed on the premises that it was not the property of the lessee but that of the boarder. And the removal of an article belonging to a third person, but which, under the above-mentioned circumstances, was not subject to the

(149) *Langhoff v. Boyer* 9 Que. S.C. 216.

(150) *Forsyth v. Beaupré* (1897) 10 Que. S.C. 311.

(151) *Macdonald v. Meloche* (1897) 11 Que. S.C. 318.

(152) *McKercher v. Gervais* (1898) 12 Que. S.C. 336.

lessor's privilege, will not serve as justification for a seizure of the lessee's effects—more especially where sufficient effects are left to secure the rent due and also the rent for the current term (153).

(153) *Foisy v. Houghton* (1898) 12 Que. P. C. 521.

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CHAPTER XVII.

MORTGAGEE'S LIEN BY DISTRESS.

Distress by land mortgagee.—A land mortgagee, after giving notice of the mortgage to the tenant in possession under a lease or tenancy created *prior* to the mortgage, may distress for the rent in arrear and unpaid at the time of the notice, as well as for rent which may accrue after such notice, although he was not in the actual seisin of the premises, nor in the receipt of the rents and profits thereof at the time the rent became due (1), but he may not distress for rent due upon a lease made by the mortgagor without his concurrence *after* the mortgage, unless he has accepted rent from the tenant or has given him notice to pay the rent and the tenant has acquiesced so as to create a new tenancy, express or implied, as between the mortgagee and the tenant (2).

Attornment by mortgagor.—The relationship of landlord and tenant may also be created between the mortgagee and the mortgagor by a stipulation, in the mortgage or otherwise, whereby the mortgagor attorns to and becomes tenant to the mortgagee (3), and if such a contract reserves a rent, and is not a mere tenancy at will or at sufferance without such a reservation, (4), the rent may be distrained for by the mortgagee as the mortgagor's landlord in like manner as in ordinary cases of landlord and tenant. It is, however,

(1) Woodfall, Landlord and Tenant (1898) 16th ed. 457; *Moss v. Gallimore* 1 Doug. 279.

(2) *Rogers v. Humphreys* 4 A. & E. 299; *Partington v. Woodcock* 6 A. & E. 690.

(3) *Ex parte Jackson* 14 Ch. D. 726.

(4) *Trust & Loan Co. v. Lawrason* (1881) 10 Can. S.C.R. 679.

essential to the validity of such an arrangement that it should be so carried out as to comply with the requirements of the law prescribed for the creation of leases, and further, that it should appear that it was really the intention of the parties to create a tenancy at the rental reserved, and not merely under colour and pretence of a lease to give the mortgagee additional security not incidental to his character of mortgagee (5); and if the rent reserved is so unreasonable and excessive as to shew conclusively that the arrangement was unreal and fictitious and that the parties could not have intended to create a tenancy, the validity of the lease may be impugned by third parties whose interests are affected, although the mortgagor himself may be estopped from disputing the tenancy (6).

In an action for damages brought by the plaintiffs against a sheriff for seizure and sale of the goods of one Coulter made under an execution in his hands, he refusing to acknowledge the plaintiff's claim for rent due under a lease by Coulter from them to an amount exceeding the value of the goods, it appeared that Coulter was in arrears under two mortgages to the plaintiffs, and in May, 1895, signed a lease of the mortgaged premises, agreeing to pay a rental of \$700 for a term ending on the first of November of the same year. The rent was made payable in advance, on the first day of January, 1895, and was shown to be about three times the rental value of the property for a year. Besides this, other circumstances were proved, tending to show that the lease had been procured by the manager of the plaintiffs with a view of preventing the

(5) *Hobbs v. Ontario Loan & Debenture Co.* (1890) 18 Can. S.C.R. 483, 493.

(6) *Hobbs v. Ontario Loan & Debenture Co.* (1890) 18 Can. S.C.R. 483.

execution creditors of Coulter getting anything out of his crops for that year, and that it was not the intention of the parties to create a real tenancy between them. It was held that the lease relied upon by the plaintiffs could not be deemed to have been intended as a bona fide one, and that the relation of landlord and tenant was not validly created thereby so as to affect third parties (7).

And in another case where the facts were similar to those in the preceding case, except that the lease relied on bore date 21st December, 1894, and purported to let the land until 1st November, 1895, at a rental of \$705 payable 1st January, 1895, and that evidence was given that the plaintiffs had insisted on the lease being signed on pain of eviction and sale of the property, but there was no evidence that plaintiffs had notice of Murray's financial difficulties, it was held that the lease was void against execution creditors on account of the excessive amount fixed for the rent (8).

A mortgagee may distrain on the mortgagor for rent reserved upon an attornment in the mortgage deed, whether such rent be payable in advance or not, and even where the mortgagee has not executed the deed, if the tenancy be at will only, or for a term not exceeding three years (9). The rental reserved under a tenancy created between the mortgagor and mortgagee need not be of a sum which would go in reduction of interest alone, but may be of a sum equal in amount to the stipulated instalment of both principal

(7) *The Imperial Loan & Investment Co. v. Clement, Re Coulter* 11 Man. R. 428.

(8) *Imperial Loan & Investment Co. v. Clement, Re Murray* (1897) 11 Man. R. 145; *Hobbs v. Ontario Loan & Diebenture Co.* (1890) 18 Can. S.C.R. 483 followed.

(9) *Morton v. Woods*, L.R. 3 Q.B. 658.

and interest (10), with the qualification before mentioned that to be valid as to third parties the amount of rent must not be unreasonable and excessive (11); and although a distress be made nominally for interest, the mortgagees may justify the taking on the ground that an instalment of principal was in arrear (12).

Termination of tenancy.—If no rent has been fixed for the period subsequent to the time at which the mortgage matures, the tenancy created by an attornment clause reserving a rental equivalent to the interest stipulated for in the proviso for re-payment will terminate with the last instalment which the mortgagor thereby contracted to pay; and under the Statute of Anne (13) a distress cannot be made if more than six months has elapsed after the expiration of the tenancy (14).

Where there is an attornment clause reserving a rental equivalent to the mortgage interest, a mortgagor who continues in possession after the mortgage has matured, and who has not contracted to pay interest thereafter, becomes a tenant at sufferance, and is no longer a tenant at the rental fixed by the mortgage. The interest after maturity in such a case is recoverable as damages only and not as a matter of contract, and it becomes necessary to prove a new fixation of the rental between the mortgagor and the mortgagee

(10) *McDonell v. Building & Loan Ass'n* (1886) 10 Ont. R. 580.

(11) *Hobbs v. Ontario Loan & Debenture Co.* (1890) 18 Can. S.C.R. 483.

(12) *McDonell v. Building & Loan Ass'n* (1886) 10 Ont. R. 580.

(13) 8 Anne, c. 14.

(14) *Klinck v. Ontario Industrial Loan Co.* (1888) 16 Ont. R. 562, 565.

in order to continue in force the right of distress incident to the original attornment (15).

License to distrain for interest in arrear.—It is customary to insert in land mortgages a proviso that if the mortgagor shall make default in payment of interest it shall be lawful for the mortgagee or his assigns to distrain therefor upon the mortgaged lands and premises, or any part thereof, and, by distress warrant, to recover by way of rent reserved, as in the case of a demise of the said lands and premises, so much of such interest as shall, from time to time, be, or remain in arrear and unpaid, together with all costs, charges and expenses attending such levy or distress, as in like cases of distress for rent.

Such a power of distress is, by virtue of the Ontario Short Forms of Mortgages Act (16), conferred under a clause in any mortgage expressed to be made pursuant to that Act as follows :—

“ Provided that the mortgagee may distrain for
“ arrears of interest.”

This proviso may be included in the mortgage, whether or not there is an attornment clause creating the relationship of landlord and tenant, but in the absence of any attornment clause, or even where there is an attornment clause but no rental is expressly reserved, the mortgagee can distrain only to the extent to which the mortgagor has by the proviso contracted that the mortgagee shall have such privilege, and with respect to such goods and chattels only as the mortgagor is the owner and entitled to

(15) *Klinck v. Ontario Industrial Loan Co.* (1888) 16 Ont. R. 562 ;
Bickley v. Beatty 17 U.C.R. 469 ; *Clowes v. Hughes*, L.R. 5 Exch. 160.

(16) R.S.O. 1897, c. 126.

encumber with such a license of distraint (17). What is to be recovered by the distress under the distress clause in the Ontario Short Forms Act is not rent but interest *eo nomine*; and, although the *recovery* is to be 'by way of rent reserved,' the interest is not, as soon as it gets into arrear, to be considered as rent reserved. The words 'by way of rent reserved' are not used in connection with the interest, but with the mode of recovering it (18).

Where there is no rent reserved, a power of distress given by the contract between the parties for arrears of interest will not give the mortgagee a right to claim priority as against a seizure under execution against the mortgagor made before any levy under the stipulated power (19).

In Ontario the right of a mortgagee to distrain on the mortgagor's goods is governed by the following statutory provisions:—

"The right of a mortgagee to distrain for interest
"in arrear upon a mortgage, shall be limited to the
"goods and chattels of the mortgagor, and as to such
"goods and chattels, to such only as are not exempt
"from seizure under execution. This section shall
"not apply to mortgages existing on the 25th day of
"March, 1886" (20).

"As against creditors of any mortgagor or person
"in possession of mortgaged premises under a
"mortgagor, the right, if any, to distrain upon the

(17) *Laing v. Ontario Loan & Savings Co.* 46 U.C.R. 114;
Doe d. Wilkinson v. Goodier 10 Q.B. 957.

(18) *Trust & Loan Co. v. Lawrason* (1882) 10 Can. S.C.R. 679,
701, per Strong, J.; *Royal Canadian Bank v. Kelly* 22 U.C.C.P. 279
considered.

(19) *Trust & Loan Co. v. Lawrason* (1882) 10 Can. S.C.R. 679.

(20) R.S.O. 1897, c. 121, s. 15.

"mortgaged premises for arrears of interest, or for
"rent in the nature of or in lieu of interest, under the
"provisions of any mortgage executed after the 23rd
"day of April, 1887, shall be restricted to one year's
"arrears of such interest or rent, but this restriction
"shall not apply unless some one of such creditors
"shall be an execution creditor, or unless there shall
"be an assignee for the general benefit of such
"creditors appointed before lawful sale of the goods
"distrained, nor unless the officer executing such writ of
"execution, or such assignee shall, by notice in writing
"to be given to the person distraining, or his attorney,
"bailiff, or agent, before such lawful sale, claim the
"benefit of the said restriction, and in case such notice
"is so given, the distrainer shall relinquish to the
"officer or assignee the goods distrained, upon receiv-
"ing one year's arrears of such interest or rent and his
"reasonable costs of distress, or if such arrears and
"costs shall not be paid or tendered he shall sell only
"so much of the goods distrained as shall be necessary
"to satisfy one year's arrears of such interest or rent
"and the reasonable costs of distress and sale, and
"shall thereupon relinquish any residue of goods, and
"pay any residue of moneys, proceeds of goods so
"distrained, to the said officer or assignee."

"Any officer executing a writ of execution, or an
"assignee, who shall pay any money to relieve goods
"from distress under the next preceding subsection,
"shall be entitled to reimburse himself therefor out of
"the proceeds of the sale of such goods."

"Goods distrained for arrears of interest or rent,
"as aforesaid, shall not be sold except after such public
"notice as is now required to be given by a landlord
"who sells goods distrained for rent" (21).

(21) R.S.O. 1897, c. 121, s. 16.

By statute in Manitoba "the right of mortgagees "to distrain for interest due upon mortgages shall be "limited to the goods and chattels of the mortgagor "only, and, as to such goods and chattels, to such "only as are not exempt from seizure under execution" (22).

A similar restriction is in force in the North West Territories, under a recent Ordinance (23) providing that the right of a land mortgagee or of his assigns to distrain for interest in arrear or principal due upon a mortgage shall, *notwithstanding anything stated to the contrary* in the mortgage, or in any agreement relating to the same, be limited to the goods and chattels of the mortgagor or his assigns and as to such goods and chattels to such only as are not exempt from seizure under execution.

Where a mortgage contained an attornment clause by which one R. agreed to become the tenant of the mortgagee at a yearly rental equivalent to the yearly interest, and also contained the usual proviso for distress for arrears of interest, it was held in Manitoba that the mortgagees might distrain for the arrears either as rent or as interest, but if they distrained for *interest* their right would be restricted by the statute, to the goods and chattels of the mortgagor only (24). Where a loan company holding a mortgage upon lands, by their warrant authorized their bailiff to distrain the goods of the mortgagor upon the mortgaged premises for arrears due under the mortgage, and, the mortgagor being dead, the bailiff under the direction of a local agent of the company seized the goods of a stranger upon the premises, it was held that he was

(22) R.S.M. 1891, c. 46, s. 2.

(23) Ordinance N.W.T. 1898, No. 16, s. 1, now *Consol. Ord.* N.W.T. 1898, c. 34, s. 5.

(24) *Miller v. Imperial Loan & Investment Co.* (1897) 1 Man. R. 247, 254.

acting within the scope of his authority as agent for a principal, in making the seizure upon the premises, and that the mortgagees were liable for the illegal seizure (25). And if the person who issues a distress warrant takes advantage of the proceedings by receiving the proceeds of a distress illegally made thereunder, it may be inferred, in the absence of evidence to the contrary, that he either knew of the illegality or meant to take upon himself without inquiry the risk of any irregularity the bailiff may have committed, and to adopt the bailiff's acts (25a).

Under the Ontario Mortgage Act (26) when a notice is given pursuant to a condition or proviso in the mortgage, by the mortgagee of his intention to exercise the power of sale therein contained, no further proceedings may be taken until the expiration of the time specified in the notice with respect to any clause, covenant or provision contained in the mortgage, "unless and until an order permitting the same shall first be had and obtained." Under this section an order may be made permitting a sale to take place under a warrant of distress for interest issued within the time specified (27).

The proviso for distress contained in a mortgage of lands will be controlled and overridden by any clause inconsistent therewith preceding it in the indenture; and if the proviso is in the printed portion of a form and there is a written clause inconsistent therewith appearing either before or after the proviso for

(25) *McBride v. Hamilton Provident and Loan Society*, 29 Ont. R. 161; *Lewis v. Read*, 13 M. & W. 834, and *Haseler v. Lemoyne*, 5 C.B.N.S. 530, followed.

(25a) *Dick v. Winkler* (1899) 35 Can. Law Jour. 652.

(26) R.S.O. 1897, c. 121, s. 31.

(27) *Plaxton v. Barrie* (1899) 35 Can. Law Jour. 611 (Ont.)

distress, the words superadded in writing are entitled to have greater effect attributed to them than the printed clause (28).

A distress clause or power of distress for the mortgage interest will extend only to the interest stipulated for by the mortgage, i.e., what is recoverable by the terms of the contract; and if the contract is silent as to the rate chargeable after maturity of the principal (29) the subsequent interest at the statutory rate of six per cent. per annum allowed by law is recoverable as damages only, and will not come within the terms of the distress clause (30).

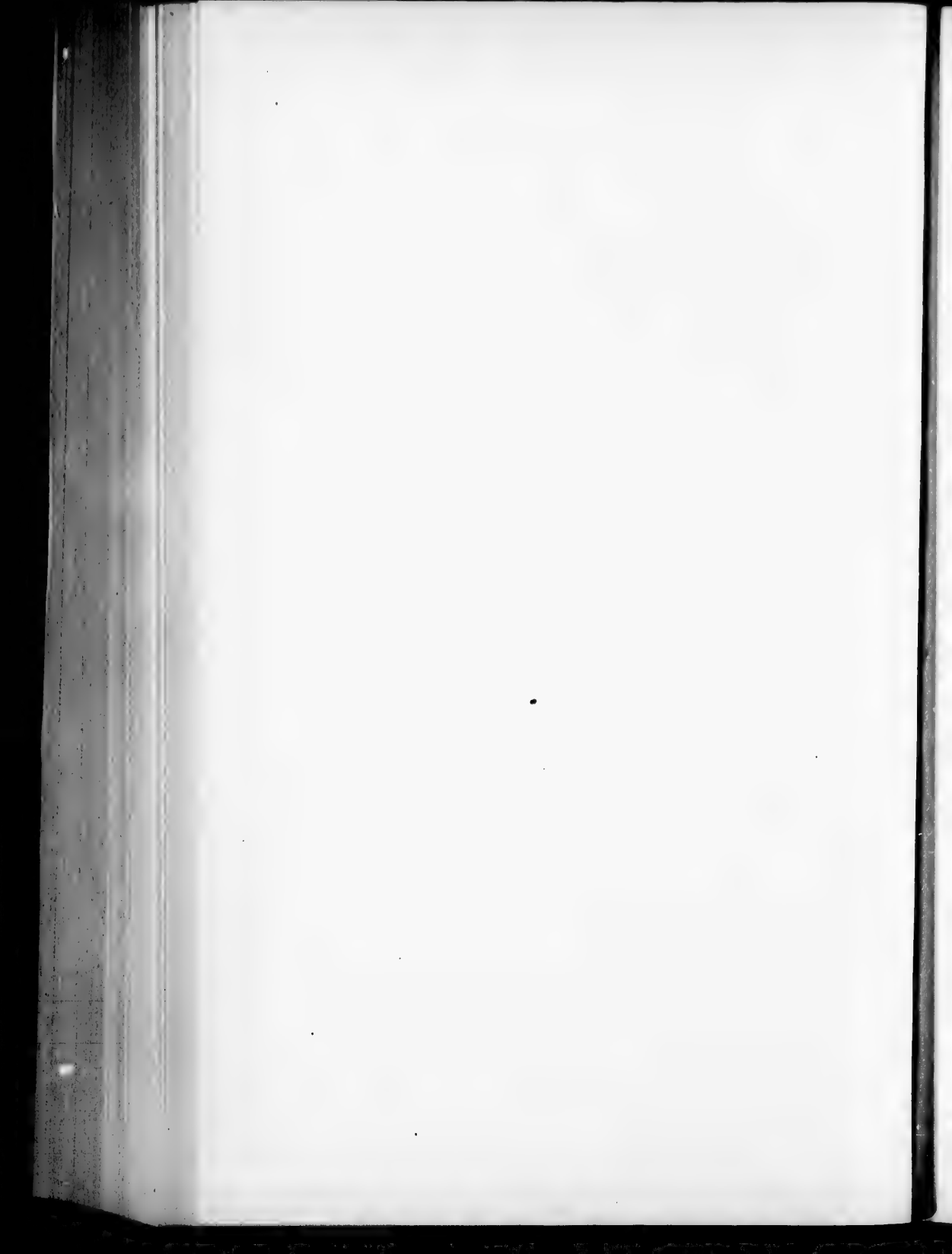
(28) *McKay v. Howard* 6 Ont. R. 135, per Boyd, C.

(29) *Peck v. Powell* 11 Can. S.C.R. 494.

(30) *Klinck v. Industrial Loan Co.* (1888) 16 Ont. R. 562.

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APPENDIX.

Statutes Relating to Conditional Sales of Chattels.

PROVINCE OF BRITISH COLUMBIA.

THE "SALE OF GOODS ACT," REVISED STATUTES OF
BRITISH COLUMBIA 1897, c. 169.

25. Formalities requisite to valid conditional sales.

From and after the coming into force of this Act, every receipt-note, hire receipt, or order for chattels given by any bailee of chattels where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money, or some stipulated part thereof, shall be void as against any subsequent purchasers or mortgagees of such chattels without notice in good faith for valuable consideration, unless a true copy of any such receipt-note, hire receipt, order, or other instrument evidencing the bailment or conditional sale given to secure the purchase money, or part thereof, shall be filed with the proper officer, not later than twenty-one days after the delivery of the goods, or the first portion thereof, to the bailee or conditional purchaser; and no such bailment or

conditional purchase shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing, signed by the bailee, or conditional purchaser, or his agent. The proper officer with whom any instrument as aforesaid shall be filed shall be the officer with whom a bill of sale affecting property situate at the place where the bailee or conditional purchaser resides at the time of the bailment or conditional purchase would by law be required to be registered. 1896, c. 9, s. 1.

[For names of places at which filing must be made see ante, page 22.]

26. Statement of amount due to be given on request.—Every manufacturer, bailor or vendor shall, on application by any proposed purchaser or other interested person, within five days furnish full information respecting the amount or balance due or unpaid on any such manufactured goods or chattels, and the terms of payment of such amount or balance, and in case of refusal or neglect to furnish the information asked for, such manufacturer, bailor or vendor shall be liable to a fine not exceeding fifty dollars on summary conviction before a Stipendiary or Police Magistrate or two Justices of the Peace. 1892, c. 21, s. 2.

27. Address to be given by person demanding statement.—The person so inquiring (if by letter) shall give a name and post office address to which a reply may be sent, and it shall be sufficient if the information aforesaid be given by registered letter deposited in the post office within the said five days, addressed to the person inquiring at his proper post office address, or where a name and address is given as aforesaid, addressed to such person by the name and at the post office so given. 1892, c. 21, s. 3.

28. Power to redeem chattel.—If any manufacturer, bailor, or vendor, of such chattel or chattels, or his successor in interest where there has been a conditional sale, or promise of sale, take possession thereof for breach of condition, he shall retain the same for twenty days, and the bailee, or his successor in interest, may redeem the same within such period on payment of the full amount then in arrear, together with interest and the actual costs and expenses of taking possession which have been incurred. 1892, c. 21, s. 4.

29. Notice of sale.—When the goods or chattels have been sold or bailed originally for a greater sum than thirty dollars, the same, when taken possession of, as in the preceding section mentioned, shall not be sold without five days' notice of the intended sale being first given to the bailee, or his successor in interest. The notice may be personally served or may, in the absence of such bailee or his successor in interest, be left at his residence or last known place of abode in British Columbia, or may be sent by registered letter deposited in the post office at least seven days before the time when the said five days will elapse, addressed to the bailee, or his successor in interest, at his last known post office address in Canada. The said five days or seven days may be part of the twenty days in the previous section mentioned. 1892, c. 21, s. 5.

30. Officer to file copy of receipt.—The proper officer, on receipt of the copy mentioned in section 25 of this Act, shall duly file the same and cause it to be properly entered in an index book to be kept for that purpose, and shall be entitled to charge twenty-five cents for every such filing, and ten cents for every search in respect thereof. In the event of any vari-

ance between the original document and the copy which has been filed, the copy filed shall prevail. 1892, c. 21, s. 6.

31. Copy of receipt to be left with vendee.—The manufacturer, bailor, or vendor shall have a copy of the receipt-note, hire receipt, order, or other instrument by which a lien on the chattel is retained, or which provides for a conditional sale, with the bailee or conditional vendee at the time of the execution of the instrument, or within twenty days thereafter. 1892, c. 21, s. 7.

32. Risk prima facie passes with property.—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk, whether delivery has been made or not: Provided that where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault: Provided also, that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party. 56 & 57 Vict. (Imp.) c. 71, s. 20.

Transfer of title.

33. Sale by person not the owner.—Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:

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(2) Provided also, that nothing in this Act shall affect—

(a) The provisions of the "Factors' Act," or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof :

(b) The validity of any contract of sale under any special common law or statutory power of sale, or under the order of a Court of competent jurisdiction. 56 & 57 Vict. (Imp.) c. 71, s. 21.

34. Market overt.—Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller :

(2) Nothing in this section shall affect the law relating to the sale of horses. 56 & 57 Vict. (Imp.), c. 71, s. 22.

35. Sale under voidable title.—When the seller of goods has a voidable title thereto, but his title has not been voided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title. 56 & 57 Vict. (Imp.), c. 71, s. 23.

36. Revesting of property in stolen goods on conviction of offender.—Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise :

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the

property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender. 56 & 57 Vict. (Imp.), c. 71, s. 24.

37. Seller or buyer in possession after sale. -

Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same :

(2) Where a person having bought or *agreed to buy* goods obtains, with the consent of the seller, possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner :

(3) In this section the term "mercantile agent" has the same meaning as in the "Factors' Act." 56 & 57 Vict. (Imp.), c. 71, s. 25.

THE "FACTORS' ACT," REVISED STATUTES OF BRITISH
COLUMBIA 1897, c. 4.

10. Disposition by buyer obtaining possession.—

Where a person having bought or *agreed to buy* goods obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, *or under any agreement for sale, pledge or other disposition thereof*, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. 52 & 53 Vict. (Imp.) c. 45, s. 9.

THE "LANDLORD AND TENANT ACT," REVISED
STATUTES OF BRITISH COLUMBIA 1897, c. 110.

2. Limitation of right to distrain.—The right of a landlord to distrain for rent owing to him by his tenant on goods in possession of the tenant, which said goods have been sold to the tenant under a duly filed agreement for hire, contract or conditional sale, shall be limited to three months' rent; and payment by the hirer or owner of such goods of three months' rent as aforesaid, or so much thereof as shall be sufficient to satisfy the landlord's claim, shall discharge the claim of the said landlord as against the said goods. 1896, c. 18, s. 2.

PROVINCE OF MANITOBA.

REVISED STATUTES OF MANITOBA 1891, CHAPTER 87.

AN ACT RESPECTING LIEN NOTES.

Her Majesty, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows :—

1. Short Title.—This Act may be cited as "The Lien Notes Act."

2. Manufactured goods to have name stamped, etc.—On, from and after the twenty-seventh day of July, in the year one thousand eight hundred and eighty-six, receipt notes, hire receipts and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee, were and shall be only valid in the case of manufactured goods or chattels which, at the time the bailment is entered into, have the manufacturer's name or some other distinguishing name painted, printed or stamped thereon or otherwise plainly attached thereto ; and no such bailment shall be valid unless it be evidenced in writing, signed by the person thus taking possession of the chattel. 49 V. c. 32, s. 1.

3. Manufacturers to furnish information.—Every manufacturer and his agents shall forthwith, on application, furnish to any applicant full information respecting the balance due on any such manufactured goods or chattels and the terms of payment of such balance, and in case he or they refuses or refuse, neglects or

neglect to furnish the information asked for, such manufacturer or agent shall be liable to a fine of not less than ten dollars nor more than fifty dollars on conviction before any justice of the peace. 49 V. c. 32, s. 2.

STATUTES OF MANITOBA 1893, CHAPTER 17.

AN ACT PROHIBITING THE REGISTRATION OF LIEN NOTES, HIRE RECEIPTS, AND ORDERS FOR CHATTELS IN REGISTRY AND LAND TITLES OFFICES.

[Assented to, March 11th, 1893.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Manitoba, enacts as follows :—

1. Registration of lien notes prohibited.—On and after the day on which this Act comes into force, no lien notes, hire receipts, orders for chattels or documents or instruments which contain as a portion thereof or have annexed thereto or endorsed thereon an order, contract or agreement for the purchase or delivery of any chattel or chattels, shall be registered in any Registry Office or Land Titles Office in the Province of Manitoba, anything contained in any statute of the Province of Manitoba to the contrary notwithstanding.

(2) Application to caveats.—This section shall apply to caveats registered under "The Real Property Act," and no caveat shall be registered or filed in any Land Titles Office which has annexed thereto or endorsed thereon, or which refers to or is founded upon any instrument or document, or part thereof, the registration of which is prohibited by this section.

2. Registrars to refuse to register. It shall be the duty of every Registrar and District Registrar to whom any such lien note, hire receipt, order for chattels, document, instrument or caveat, the registration whereof is prohibited by the next preceding section, is presented to refuse to receive the same.

3. Registration if effected to be void. If notwithstanding the foregoing provisions of this Act, by inadvertence, accident, mistake or the non-performance of duty on the part of a Registrar or District Registrar, any such lien note, hire receipt, order for chattels, document, instrument, or caveat, the registration or filing whereof is prohibited by the first section of this Act, be registered or filed in any Registry Office or Land Titles Office in the Province of Manitoba, nevertheless such registration or filing shall be absolutely null and void.

4. This Act shall come into force on the day it is assented to.

STATUTES OF MANITOBA 1894, CHAPTER 14.

AN ACT TO AMEND "AN ACT PROHIBITING THE
REGISTRATION OF LIEN NOTES, HIRE RECEIPTS
AND ORDERS FOR CHATTELS IN REGISTRY AND
LAND TITLES OFFICES.

[Assented to, 2nd March, 1894.

Whereas doubts have arisen as to the operation and effect of the Act passed in the fifty-sixth year of Her present Majesty's reign, and Chaptered 17 ;

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Manitoba, enacts as follows :—

1. Declaration as to effect of 56 Vic., c. 17. It is hereby declared that every lien note, hire receipt, order for chattels, or document or instrument the registration of which was or is prohibited by said Act, was and is since the eleventh day of March, 1893, and shall hereafter be, in so far as the same purports to affect land, absolutely null and void as against any person or corporation claiming an interest or estate in lands under a registered instrument.

2. Notice to person claiming under registered instrument not to prevent operation of preceding section.

No notice, past, present or future, actual or constructive to the person or corporation claiming under such registered instrument shall avail to prevent the operation of the preceding section. Notice whether actual or constructive in such cases shall be void and of no effect whatever.

THE "SALE OF GOODS ACT," MANITOBA STATUTES
1896, CHAPTER 25.

24. Seller or buyer in possession after sale.

(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller,

possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" means a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

STATUTES OF MANITOBA 1899, CHAPTER 36.

AN ACT TO AMEND "THE SALE OF GOODS ACT."

[Assented to, 13th April, 1899.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Manitoba, enacts as follows :—

1. Sale of Goods Act, 1896, s. 24, s-s. 2, amended.
—Sub-section (2) of Section 24 of Chapter 25 of 59 Victoria, shall not apply in the case of goods in the possession of any person who has bought or agreed to buy the same under a contract or agreement in writing, signed by him, providing that the property in or title to the goods should not pass to the buyer until payment in full of the price thereof.

2. Amendment retrospective except in certain cases.

Section 1 of this Act shall be construed as if it had been passed at the same time as said Chapter 25 of 59 Victoria, except in the case of any goods or chattels that have been before the passing of this Act actually sold to and possession thereof taken by a purchaser in good faith from the buyer referred to in said section, and except where there is any litigation pending respecting any of such goods and chattels.

3. Commencement of Act.—This Act shall come

into force on the day it is assented to.

PROVINCE OF NEW BRUNSWICK.

STATUTES OF NEW BRUNSWICK 1899, CHAPTER 12.

AN ACT RESPECTING CONDITIONAL SALES
OF CHATELS.

[Passed 28th April, 1899.

Be it enacted by the Lieutenant-Governor and Legislative Assembly as follows :

1. Receipt notes, etc., for chattels.—Receipt notes, hire receipts and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money, or some stipulated part thereof, shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration, in the case of manufactured goods or chattels, which at the time possession is given to the bailee have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon, or otherwise plainly attached thereto, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing, signed by the bailee or his agent, and a copy of such writing filed as provided in the next section of this Act.

2. Copy of written evidence to be filed.—A copy of such writing shall be filed with the registrar of deeds of the county in which the bailee or conditional purchaser resided at the time of the bailment or con-

ditional purchase, within 10 days from the execution of the receipt note, hire receipt, order, or other instrument evidencing the bailment or conditional sale given to secure the purchase money, or a part thereof.

3. Registrar's fees.—The Registrar, on receipt of such copy, shall duly file the same and cause it to be properly entered in an index book to be kept for that purpose, and shall be entitled to charge ten cents for every such filing, and five cents for every search in respect thereof. A clerical error which does not mislead, or an error in an immaterial or non-essential part of said copy so filed, shall not invalidate the said filing or destroy the effect thereof.

4. Copy to be left with bailee.—The manufacturer, bailor or vendor shall leave a copy of the receipt note, hire receipt, order or other instrument by which a lien on the chattel is retained, or which provides for a conditional sale, with the bailee or conditional vendee at the time of the execution of the instrument or within twenty days thereafter.

5. Creditor may require sworn statement.—Every manufacturer, bailor or vendor shall, on demand by any creditor or interested person, file with said registrar, within 20 days from the making of said demand, a sworn statement of the amount due on any such receipt note, hire receipt or order, and, on failure to so file said statement, shall forfeit all rights accruing under said receipt-note, hire receipt or order, as against such creditor or interested person.

6. Bailee's right of redemption.—In case any manufacturer bailor or vendor of any chattels in respect of which there has been a conditional sale or promise of sale, or his successor in interest, takes possession thereof for breach of condition, he shall

retain the same for 20 days and the bailee or his successor in interest may redeem the same within such period on payment of the full amount then in arrear, together with interest and the actual costs and expenses of taking possession which have been incurred.

7. Notice of sale.—Where goods or chattels have been sold or bailed originally for a greater sum than \$30, and the same have been taken possession of as in the preceding section mentioned, such goods or chattels shall not be sold without 5 days notice of the intended sale being first given to the bailee or his successor in interest. The notice may be personally served, or may, in the absence of such bailee or his successor in interest, be left at his residence or last known place of abode in New Brunswick, or may be sent by registered letter deposited in the post office at least 7 days before the time when the said five days will elapse, addressed to the bailee or his successor in interest at his last known post office address in Canada. The said 5 days or 7 days may be part of the 20 days in the last preceding section mentioned.

8. Chattel affixed to realty.—(1) Where any goods or chattels have been sold or bailed under any receipt note, hire receipt or other instrument by which it is agreed that no ownership therein shall be acquired by the purchaser or bailee until the payment of the purchase or consideration money, or some stipulated part thereof, and such goods or chattels are affixed to any realty without the *consent in writing* of the owner of the goods or chattels, such goods and chattels shall not be or become part of the realty, but shall continue to be and remain personal property; and the rights of the owner or owners thereof shall not be in any way altered or affected by such goods or chattels being so affixed to the realty, but the owner of such realty, or

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APPENDIX.

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any purchaser or any mortgagee, or other incumbrancer on such realty, shall have the right as against the manufacturer, bailor or vendor of such goods or chattels, or any person claiming through or under him, to retain the said goods and chattels upon payment of the amount due and owing thereon.

(2) The provisions of this section are to be deemed retroactive, and shall apply to past as well as to future transactions, but shall not apply to or affect any suit either at law or in equity now pending.

THE NORTH WEST TERRITORIES.

CONSOLIDATED ORDINANCES 1898, CHAPTER 44.

AN ORDINANCE RESPECTING HIRE RECEIPTS AND
CONDITIONAL SALES OF GOODS.

The Lieutenant Governor by and with the advice and consent of the Legislative Assembly of the Territories enacts as follows :

1. Conditional sales of goods.—Whenever on a sale or bailment of goods of the value of \$15 or over it is agreed, provided or conditioned that the right of property or right of possession in whole or in part shall remain in the seller or bailor notwithstanding that the actual possession of the goods passes to the buyer or bailee the seller or bailor shall not be permitted to set up any such right of property or right of possession as against any purchaser or mortgagee of or from the buyer or bailee of such goods in good faith for valuable consideration or as against judgments, executions or attachments against the purchaser or bailee, unless such sale or bailment with such agreement, proviso or condition is in writing signed by the bailee or his agent and registered as hereinafter provided. Such writing shall contain such a description of the goods the subject of the bailment that the same may be readily and easily known and distinguished :

Provided that nothing in this section shall apply to any bailment where it is not intended that the property in the goods shall eventually pass to the bailee on payment of purchase money in whole or in part or the performance of some condition by the bailee. No. 39 of 1897, s. 1 ; No. 18 of 1898, s. 1.

2. Registration.—Such writing or a true copy thereof shall be registered in the office of the registration clerk for chattel mortgages in the registration district within which the buyer or bailee resides within thirty days of such sale or bailment and also in the registration district in which the goods are delivered or to which they may be removed within thirty days of such delivery or removal verified by the affidavit of the seller or bailor or his agent stating that the writing (or copy) truly sets forth the agreement between the parties and that the agreement therein set forth is bona fide and not to protect the goods in question against the creditors of the buyer or bailee as the case may be. No. 39 of 1897, s. 2 ; No. 18 of 1898, s. 2.

3. Renewal of Registration.—The seller or bailor, his executors, administrators or assigns or his or their agent, shall within thirty days next preceding the expiration of two years from the date of such registration file with such registration clerk a renewal statement verified by affidavit showing the amount still due to him for principal and interest, if any, and of all payments made on account thereof and whether and to what extent the condition, if any, of the bailment is still unperformed and thereafter from year to year a similar statement similarly verified within the thirty days next preceding the expiration of the year from the filing of the last renewal statement, and in default of such filing the seller or bailor shall not be permitted to set up any right of property or right of possession in the said goods as against the creditors of the buyer or bailee or any purchaser or mortgagee of or from the buyer or bailee in good faith for valuable consideration. No. 39 of 1897, s. 3.

4. Penalty for false statement.—Any seller or bailor or agent of such seller or bailor making any false

statement in such renewal statement shall be guilty of an offence and liable on summary conviction thereof to a fine not exceeding \$100. No. 39 of 1897, s. 4.

5. Seller bound by statement made in renewal.—

Any such seller or bailor shall be bound by any statement made by him or his agent in such renewal statement and the goods shall be liable to redemption and the seller or bailor to be divested of his property and right of possession if any in the goods upon payment of the amount actually due and owing in respect thereof or upon performance of the condition of the bailment by the buyer, bailee or any person claiming by, through or under the buyer or bailee. No. 39 of 1897, s. 5.

6. Memorandum of satisfaction of seller.—

The seller or bailor shall upon payment or tender of the amount due in respect of such goods or performance of the conditions of the bailment sign and deliver to any person demanding it a memorandum in writing stating that his claims against the goods are satisfied and such memorandum shall thereupon operate to divest the seller or bailor of any further interest or right of possession if any in the said goods. Any such memorandum if accompanied by an affidavit of execution of an attesting witness may be registered. No. 39 of 1897, s. 6.

7. Retaking possession.—

In case the seller or bailor shall retake possession of the goods he shall retain the same in his possession for at least twenty days and the buyer, bailee, or any one claiming by or through or under the buyer or bailee, may redeem the same upon payment of the amount actually due thereon and the actual necessary expenses of taking possession. No. 39 of 1897, s. 7.

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8. Five days' notice of sale to be given.—The goods or chattels shall not be sold without five days notice of the intended sale being first given to the buyer or bailee or his successor in interest. The notice may be personally served or may in the absence of such buyer, bailee or his successor in interest be left at his residence or last place of abode or may be sent by registered letter deposited in the post office at least seven days before the time when the said five days will elapse addressed to the buyer or bailee or his successor in interest at his last known post office address in Canada. The five days or seven days may be part of the twenty days mentioned in section 7 hereof. No. 39 of 1897, s. 8.

9. Copies of instrument to be evidence.—Copies of any instrument filed under this Ordinance certified by the registration clerk shall be received as prima facie evidence for all purposes as if the original instrument were produced and also as prima facie evidence of the execution of the original instrument according to the purport of such copy. And the clerk's certificate shall also be prima facie evidence of the date and hour of registration or filing. No. 39 of 1897, s. 9.

10. Registration fees.—The registration clerk shall be entitled to charge a fee of 25 cents for each registration; 10 cents for each search; 10 cents per 100 words for copies of documents and 25 cents for each certificate. No. 39 of 1897, s. 10.

“THE SALE OF GOODS ORDINANCE,” CONSOLIDATED
ORDINANCES 1898, CHAPTER 39.

25. Seller or buyer in possession after sale.—Where a person having sold goods continues or is in possession of the goods or of the documents of title to the

goods the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer was expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in *The Factors' Ordinance*, No. 10 of 1896, s. 24.

"THE FACTORS' ORDINANCE," CONSOLIDATED
ORDINANCES 1898, C. 40.

10. Disposition by buyer obtaining possession.—

Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, pledge or other disposition thereof or under any *agreement* for sale, pledge or other disposition thereof to any person receiving the same in

good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. No. 9 of 1896, s. 9.

ORDINANCE RESPECTING DISTRESS FOR RENT AND
EXTRA-JUDICIAL SEIZURE, CONSOLIDATED ORDINANCES 1898, CHAPTER 34.

2. Seizure under chattel mortgages, etc., costs regulated.—No person whosoever making any seizure under the authority of any chattel mortgage, bill of sale or any other extra-judicial process whatsoever nor any person whosoever employed in any manner in making such seizure or doing any act whatsoever in the course of such seizure or for carrying the same into effect shall have, take or receive out of the proceeds of the goods and chattels seized and sold, from the person against whom the seizure may be directed or from any other person whomsoever, any other or more costs and charges for and in respect of such seizure or any matter or thing done therein or thereunder than such as are fixed in the schedule hereto and applicable to each act which shall have been done in course of such seizure, and no person or persons whosoever shall make any charge whatsoever for any act or matter or thing mentioned in the said schedule unless such act, matter or thing shall have been really performed and done. R.O. c. 52, s. 2.

3. Penalty for taking excessive costs.—If any person making any distress or seizure referred to in sections 1 and 2 of this Ordinance shall take or receive any other or greater costs than are set down in the said

schedule or make any charge whatsoever for any act, matter or thing mentioned in the said schedule and not really performed or done, the party aggrieved may cause the party making the said distress or seizure to be summoned before the Supreme Court of the judicial district in which the goods and chattels distrained upon or seized or some portion thereof lie, and the said court may order the party making the distress or seizure to pay to the party aggrieved treble the amount of moneys taken contrary to the provisions of this Ordinance and the costs of suit. R.O. c. 52, s. 3.

[Section 1 referred to relates to distress for rent.]

4. Distraint for rent limited to property of tenant—
Exceptions.—A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent although the same are found on the premises; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant whether absolute or in trust or by way of mortgage or otherwise, *nor to the interest of the tenant in any goods* on the premises in the possession of the tenant under a contract for purchase or by which he may or is to become the owner thereof *upon performance of any condition*, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law or son-in-law of the tenant or by any

other relative of his in case such other relative lives on the premises as a member of the tenant's family.
No. 7 of 1896, s. 1.

SCHEDULE.

1. Levying distress..... \$1 00
2. Man in possession, per day..... 1 50
3. Appraisement, whether by one appraiser or more, two cents on the dollar on the value of goods up to \$500, and one per cent. on the dollar for each additional \$500 or fraction thereof up to \$2,000, and one-half per cent. on all sums over that amount.
4. All reasonable and necessary disbursements for advertising.
5. Catalogue, sale, commission and delivery of goods, three per cent. on the net proceeds of the goods up to \$1,000, and one and one-half per cent. thereafter.

PROVINCE OF NOVA SCOTIA.

REVISED STATUTES (Fifth Series) 1884, CHAPTER 92.

OF THE PREVENTION OF FRAUDS ON CREDITORS BY
SECRET BILLS OF SALE.

[In force until the proclamation of the 1899 Act.]

3. Conditional sale agreements.—Every hiring, lease, or agreement for the sale of goods and chattels accompanied by an immediate delivery, and followed by an actual and continued change of possession, whereby it is agreed that the property in the goods and chattels, or in case of an agreement for sale, a lien thereon for the price or value thereof, or any portion thereof, shall remain in the hirer, lessor, or bargainor, until the payment in full of such price or value by future payments or otherwise, shall be in writing, signed by the parties thereto, or their duly authorized agents, in writing, a copy of which authority shall be attached to such agreement, and shall set forth fully, by recital or otherwise, the terms, nature and effect of such hiring, lease, or bargain for sale, and the amount to be paid thereunder, whether expressed as rent, payment, or otherwise; and shall be accompanied by the affidavit of either of the parties; or in case such agreement has been signed by an agent or agents of the parties, duly authorized as aforesaid, then by the affidavit of the agent of either of the parties thereto, stating that the writing truly sets forth the agreement between the parties thereto, and truly sets forth the claims, lien, or balance due to the hirer, lessor, or bargainor therein, and that such writing is executed in good faith, and for the express purpose of securing to the hirer, lessor, or bargainor, the payment of the claim, lien, or charge thereon, at the times and under the terms set out in

the writing, and for no other purpose; and such agreement and affidavit shall be registered at the time and place, and in every respect according to the provisions of this chapter; otherwise the claim, lien, charge, or property intended to be secured to the hirer, lessor, or bargainor, shall be null, void, and of no effect as against the creditors and subsequent purchasers and mortgagees of the person to whom such goods and chattels are hired, leased, or agreed to be sold. [As amended by 1886, c. 32, s. 1; 1893, c. 40, s. 1.]

6. Affidavits, before whom to be made.—The affidavits mentioned in the first section and the three next preceding sections shall be made before a judge of any court, any commissioner for taking affidavits, or any justice of the peace or notary public, and if the same is made by the agent or attorney of the party required to make the same, it shall be set out in said affidavit that the said agent or attorney making the same is personally cognizant of the facts therein set out. [As amended by 1886, c. 32, s. 5].

THE "FACTORS' ACT", STATUTES OF NOVA SCOTIA,
1895, CHAPTER 11.

9. Transfer of title.—Where a person having bought or *agreed to buy* goods obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, *or under any agreement for sale, pledge or other disposition thereof*, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same

effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

STATUTES OF NOVA SCOTIA, 1899, CHAPTER 28.

AN ACT TO PREVENT FRAUDS ON CREDITORS BY
SECRET BILLS OF SALE.

[To come into force at a date to be proclaimed, see sec. 13.]

Be it enacted by the Governor, Council, and Assembly, as follows :—

1. Act, how cited.—This act may be cited as "The Bills of Sale Act."

2. Interpretation and expressions.—In this chapter, unless the context otherwise requires :

The expression of "bills of sale" includes bills of sale, chattel mortgages, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt, but does not include the following documents, that is to say : assignments for the general benefit of the creditors of the person making or giving the same, deeds of trust or mortgages made or given by any incorporated company for the purpose of securing its bonds or debentures, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, warehouse keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof

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of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or by delivery, the possessors of such documents to transfer or receive goods thereby represented, or assignments of personal property to creditors under proceedings for the relief of indigent debtors.

The expression "personal chattels" means goods, furniture, fixtures and other articles capable of complete transfer by delivery, and does not include chattel interests in real estate, nor shares or interests in the stock, funds or securities of any government, or in the capital or property of any incorporated or joint stock company, nor choses in action.

The expression "purchasers" means bona fide purchasers, and includes the assignee of the grantor under the Indigent Debtors' Act, the official assignee, or any assignee for the general benefit of creditors.

The expression "creditors" includes execution creditors, and sheriffs, constables and other persons levying on or seizing under process of law personal chattels comprised in a bill of sale.

The expression "filing" when applied to a bill of sale includes filing a copy of a bill of sale under the provision of this chapter.

The expression "chapter" means Act."

R.S. c. 92, s. 10 part; 1886, c. 32, s. 7; 1888, c. 23, s. 1; 1893, c. 38, s. 1.

8. Hiring, leasing or bargaining for sale.—(1) Every hiring, lease or bargain for the sale of personal chattels, accompanied by an immediate delivery, and followed by an actual and continued change of possession, whereby it is agreed

- (a) That the property in the personal chattels; or
- (b) In case of a bargain for sale, a lien thereon for the price thereof or any portion thereof,

shall remain in the person letting to hire, the lessor or the bargainor until the payment in full of the hire, rental or price agreed upon by future payments or otherwise, shall be by instrument in writing, and be signed by the parties thereto, or their duly authorized agents, in writing, a copy of which authority shall be attached to such instrument.

(2) Such instrument shall set forth fully, by rec or otherwise, the terms, nature and effect of such hiring, lease, or bargain for sale, and the property or lien remaining in the person letting to hire, the lessor or bargainor, and the amount payable thereunder, whether expressed as hire, rent, price or otherwise.

(3) It shall be accompanied by the affidavit of either of the parties thereto, or if it is signed by an agent duly authorized as aforesaid, by the affidavit of such agent, stating :

(a) That such instrument truly sets forth the terms, nature and effect of such hiring, lease or bargain for sale, and the property or li remaining in the person letting to hire, lessor or bargainor, and the amount payable thereunder.

(b) That such instrument is executed in good faith and for the express purpose of securing to the person letting to hire, the lessor or the bargainor, the payment of such sum at the times and under the terms set out in the instrument.

(4) Such instrument and affidavit shall be filed in the registry of deeds for the registration district in which the personal chattels are at the time the instrument is executed, otherwise the agreement that such property or such lien shall remain in such person,

shall as against the creditors, purchasers and mortgagees of the person hiring, the lessee or bargainee, be null and void. R.S. c. 92, s. 3; 1886, c. 32, s. 1; 1893, c. 40, s. 1.

9. If grantor not a resident of Nova Scotia. Where the grantor is not a resident of Nova Scotia, in the event of the permanent removal of personal chattels from the registration district in which they are at the time of the execution of the bill of sale or other instrument to another registration district before the payment and discharge of the bill of sale or instrument, a copy of the same and of the affidavits and documents relating thereto, certified under the hand of the registrar in whose registry the same were first filed, shall be filed in the registry of deeds for the registration district to which the personal chattels are removed, within two months from such removal, otherwise the bill of sale or instrument as against creditors or purchasers shall be null and void.

10. Duties of registrars of deeds. The registrar of deeds shall cause the bills of sale or copies and instruments required by this chapter to be filed, to be numbered and indexed, and a list thereof to be made in a book kept by him for that purpose, containing the names and descriptions of the parties in alphabetical order, the date of execution and filing, and the amounts of the consideration for which the same have been given. R.S. c. 92, s. 7 part.

11. Release or discharge provided for.—Where a bill of sale or other instrument is discharged or released, an entry of such discharge or release may be made in the registry list upon the production of a certificate from the holder of such bill of sale, duly attested to by the affidavit of a subscribing witness, and such

certificate or release shall be indexed and entered on the list and on the files kept by the registrar. R.S. c. 92, s. 8 part; 1886, c. 32, s. 6.

(1) The affidavits mentioned in this chapter may be made before the registrar of deeds, a judge of any court, a commissioner for taking affidavits, a justice of the peace, or any notary public, whether within the province or abroad.

(2) If the affidavit is made by the agent or attorney of the person required to make the same, it shall be set out in such affidavit that such agent or attorney making the same has a personal knowledge of the matters deposed to. R.S. c. 92, s. 6 and s. 8 part; 1886, c. 32, s. 5.

12. Fees of registrar. The registrar shall for his services under this chapter be entitled to the fees mentioned in the table in the schedule. R.S. c. 92, s. 7 part, s. 9 part.

13. Act, when to come into force.—(1) This chapter shall come into force at a date to be proclaimed in the *Royal Gazette* by the Governor-in-Council.

(2) Upon such date the enactments mentioned in the following table will be repealed.

TABLE: Revised Statutes, chapter 92; Acts of 1886, chapter 32; Acts of 1888, chapter 23; Acts of 1893, chapter 39; Acts of 1893, chapter 40.

[N.S.]

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APPENDIX.

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TABLE OF FEES FOR REGISTRAR.

For filing, indexing and entering every bill of sale or copy, every instrument of hiring, lease or bargain, every certified copy thereof and every discharge.....	0 20
For administering every oath.....	0 20
For every inspection, whether of a single bill of sale, copy, or other instrument, or of a single title, made on one and the same day	0 20
For filing every renewal statement.....	0 10

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PROVINCE OF ONTARIO.

REVISED STATUTES OF ONTARIO 1897, CHAPTER 149.

AN ACT RESPECTING CONDITIONAL SALES OF
CHATTELS.

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :

1. Conditional sales of manufactured goods, when to be valid. --Receipt notes, hire receipts and orders for chattels, given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money or some stipulated part thereof, shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration in the case of manufactured goods or chattels, which at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing, signed by the bailee or his agent. 51 V. c. 19, s. 1.

2. When section 1 not to apply. --The preceding section shall not apply to household furniture, other than pianos, organs, or other musical instruments; nor shall it apply to any chattels mentioned in any such receipt note, hire receipt, order or other instrument where the manufacturer, bailor or vendor within ten days from the execution of the receipt note, hire

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receipt, order or other instrument evidencing the bailment or conditional sale given to secure the purchase money, or a part thereof, shall file with the Clerk of the County Court of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase, a copy of the said receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale. 51 V. c. 19, s. 6.

3. Filing of instruments in unorganized districts.

(1) When the bailee or conditional purchaser resides at the time of the bailment or conditional purchase in an unorganized district, all instruments may be filed with the Clerk of the Court with whom mortgages and sales of chattels are to be registered in such district, under the law at the time in force.

(2) This section shall apply to instruments filed with the said officer prior to the 7th day of April 1890. 53 V. c. 36, ss. 1, 2.

4. Clerk to file copy of receipt note. The Clerk of the Court, on receipt of such copy, shall duly file the same and cause it to be properly entered in an index book to be kept for that purpose, and shall be entitled to charge ten cents for every filing and five cents for every search in respect thereof. A clerical error which does not mislead, or an error in an immaterial or non-essential part of the said copy so filed, shall not invalidate the said filing or destroy the effect thereof. 51 V. c. 19, s. 7.

5. Copy of receipt note to be left with vendee.

The manufacturer, bailor or vendor shall leave a copy of the receipt note, hire receipt, order or other instrument by which a lien on the chattel is retained, or which provides for a conditional sale, with the bailee or conditional vendee at the time of the execution of

the instrument, or within twenty days thereafter. 51 V. c. 19, s. 8.

6. Statement of amount due to be given on request.

—(1) Every manufacturer, bailor or vendor shall, in answer to an inquiry made by any proposed purchaser or other interested person, within five days furnish full information respecting the amount or balance due or unpaid on any such manufactured goods or chattels, and the terms of payment of such amount or balance, and in case of his refusal or neglect to furnish the information asked for, such manufacturer, bailor or vendor shall, on conviction before a Stipendiary or Police Magistrate or two Justices of the Peace, be liable to a fine not exceeding \$50.

(2) Any person convicted under this Act shall have the right to appeal against such conviction to the Judge of the County Court without a jury. 51 V. c. 19, s. 2.

7. Address to be given by person requiring statement.—The person so inquiring shall, if such inquiry is by letter, give a name and post office address to which a reply may be sent, and it shall be sufficient if the information aforesaid be given by registered letter deposited in the post office within the said five days, addressed to the person inquiring at his proper post office address, or where a name and address is given as aforesaid, addressed to such person by the name and at the post office so given. 51 V. c. 19, s. 3.

8. Breach of condition.—In case any manufacturer, bailor or vendor of any chattels in respect of which there has been a conditional sale or promise of sale, or his successor in interest takes possession thereof for breach of condition, he shall retain the same for twenty days, and the bailee or his successor in interest may redeem the same within such period on payment of

the full amount then in arrear, together with interest and the actual costs and expenses of taking possession which have been incurred. 51 V. c. 19, s. 4.

9. Notice of sale.—Where the goods or chattels have been sold or bailed originally for a greater sum than \$30, and the same have been taken possession of, as in the preceding section mentioned, such goods or chattels shall not be sold without five days' notice of the intended sale being first given to the bailee or his successor in interest. The notice may be personally served or may, in the absence of such bailee or his successor in interest, be left at his residence or last known place of abode in Ontario, or may be sent by registered letter, deposited in the post office at least seven days before the time when the said five days will elapse, addressed to the bailee or his successor in interest, at his last known post office address in Canada. The said five days or seven days may be part of the twenty days in section 8 mentioned. 51 V. c. 19, s. 5.

10. Chattels affixed to realty to remain subject to lien.—(1) Where any goods or chattels subject to the provisions of this Act are affixed to any realty without the consent in writing of the owner of the goods or chattels, such goods and chattels shall notwithstanding remain so subject, but the owner of such realty, or any purchaser, or any mortgagee, or other incumbrancer on such realty, shall have the right as against the manufacturer, bailor or vendor of such goods or chattels, or any person claiming through or under them, to retain the said goods and chattels upon payment of the amount due and owing thereon.

(2) The provisions of this section are to be deemed retroactive and shall apply to past as well as to future transactions. 60 V. c. 3, s. 3 ; c. 14, s. 80.

THE "BILLS OF SALE AND CHATTEL MORTGAGE ACT," REVISED STATUTES OF ONTARIO 1897, CHAPTER 148.

37. Goods not in possession of bargainor.—The provisions of this Act shall extend to mortgages and sales of goods and chattels, notwithstanding that such goods and chattels may not be the property of, or may not be in the possession, custody or control of the mortgagor or bargainor or any one on his behalf at the time of the making of such mortgage or sale, and notwithstanding that such goods or chattels may be intended to be delivered at some future time, or that the same may not at the time of the making of said mortgage or sale be actually procured or provided, or fit or ready for delivery, and notwithstanding that some act may be required for the making or completing of such goods and chattels, or rendering the same fit for delivery. 57 V. c. 37, s. 37.

38. "Creditors," meaning of.—In the application of this Act the word "creditors" where it occurs, shall extend to creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee insolvency of the mortgagor, and to an assignee for the general benefit of creditors, within the meaning of *The Act respecting Assignments and Preferences by Insolvent Persons*, as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the Sheriff or other officer. 57 V. c. 37, s. 38; 60 V. c. 3, s. 3.

39. Change of possession.—The "actual and continued change of possession" mentioned in this Act shall be taken to be such change of possession as is open, and reasonably sufficient to afford public notice thereof. 57 V. c. 37, s. 39.

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40. Subsequent taking of possession.—A mortgage or sale declared by this Act to be void or which, under the provisions of section 18 has ceased to be valid, as against creditor; and subsequent purchasers or mortgagees, shall not by the subsequent taking of possession of the things mortgaged or sold by or on behalf of the mortgagee or bargainee be thereby made valid as against persons who become creditors, or purchasers, or mortgagees before such taking of possession. 57 V. c. 37, s. 40; 60 V. c. 3, s. 3.

41. Agreements where possession passes without ownership.—(1) In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void, and the sale and transfer shall be deemed to have been absolute, unless

(a) The agreement is in writing, signed by the parties to the agreement or their agents, and

(b) Unless such agreement or a duplicate or copy verified by oath is filed in the office of the County Court Clerk of the county or union of counties or in the proper office in a district in which the goods are situate at the time of making the agreement, and also in the office of the County Court Clerk of the county or union of counties or in the proper office in a district in which such trader or other person resides at the time of making the agreement, such filing to be within five days of the delivery of possession of any of the goods under the agreement. 57 V. c. 37, s. 41 (1); 58 V. c. 24, s. 2.

(2) In the territorial district of Muskoka, Nipissing, Algoma, Thunder Bay and Rainy River the agreement shall be filed in the office of the Clerk of the Peace in the district, and in the districts of Parry Sound and Manitoulin in the office of the registrar of deeds for the district ; Provided that if a Clerk of the Peace shall be appointed for the district of Parry Sound or the district of Manitoulin then any agreement requiring thereafter to be filed in such district shall be filed in the office of such Clerk of the Peace.

(3) Such an agreement, though signed and filed, shall not affect purchases from the trader or person aforesaid in the usual course of his business.

(4) The provisions of this and the four next preceding sections of this Act shall not affect the case of manufactured goods and chattels which at the time possession is given have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, nor any goods or chattels where the receipt, note, hire receipt, order or other instrument is filed and for which cases respectively provisions is made by *The Act respecting Conditional Sales of Chattels*. 57 V. c. 37, s. 41 (2-4).

THE "LANDLORD AND TENANT ACT," REVISED
STATUTES OF ONTARIO, CHAPTER 170.

31. Goods on premises not property of tenant to be exempt.—(1) A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises ; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour of any person whose title is

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derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise, nor to the *interest of the tenant* in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof *upon performance of any condition*, nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord, nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family, or by any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom such restriction does not apply. 57 V. c. 43, s. 1; 60 V. c. 15, Sched. A (60).

PROVINCE OF PRINCE EDWARD
ISLAND.

STATUTES OF PRINCE EDWARD ISLAND 1896,
CHAPTER 6.

AN ACT RESPECTING CONDITIONAL SALES
OF CHATTELS.

[Assented to, 30th April, 1896.

Be it enacted by the Lieutenant-Governor and Legislative Assembly as follows :

1. Conditional sales of manufactured goods. From and after the coming into force of this Act, receipt notes, hire receipts, and orders for chattels given by bailees of chattels, where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money, or some stipulated part thereof, shall only be valid as against subsequent purchasers or mortgagees, without notice in good faith for valuable consideration in the case of manufactured goods or chattels which, at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor of same painted, printed, stamped, or engraved thereon, or otherwise plainly attached thereto, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing, signed by the bailee or his agent.

2. Statement of amount due.—Every manufacturer, bailor or vendor shall, on application by any proposed purchaser or other interested person, within fifteen days furnish full information respecting the

amount or balance due or unpaid on any such manufactured goods or chattels, and the terms of payment of such amount or balance, and in case of refusal or neglect to furnish the information asked for, such manufacturer, bailor or vendor shall be liable to a fine not exceeding fifty dollars on conviction before a Stipendiary or Police Magistrate, or two Justices of the Peace. Any person convicted under this Act shall have the right to appeal to the Supreme Court of this Island against such conviction. In addition to his being liable to said fine, no person who refuses or neglects to furnish the information required by this section, shall be entitled to the benefit of his lien on the property in question under any receipt note, hire receipt, or order as aforesaid. The application mentioned in this section may be made personally or by registered letter deposited in the Post Office, and the Postmaster's certificate that such letter was registered, together with the oath of the person who deposited the letter, shall be *prima facie* evidence of the date and service of such application.

5. Enquiries by letter.—The person so enquiring (if by letter) shall give a name and post office address to which a reply may be sent, and it shall be sufficient if the information aforesaid be given by registered letter deposited in the post office within the said fifteen days, addressed to the person enquiring at his proper post office address, or where a name and address is given as aforesaid, addressed to such person by the name and at the post office so given. Provided always that the person or persons making such enquiry by letter shall, at the time of making such enquiry, enclose with his letter of enquiry, postage stamps sufficient to pay the postage on a registered reply to such enquiry.

4. Power to redeem chattel.—If any manufacturer, bailor or vendor of such chattel or chattels, or his successor in interest where there has been a conditional sale or promise of sale, take possession thereof for breach of condition, he shall retain the same for twenty days, and the bailee or his successor in interest may redeem the same within such period on payment of the full amount then in arrear, together with interest and the actual costs and expenses of taking possession which have been incurred.

5. Notice of sale.—When the goods or chattels have been sold or bailed originally for a greater sum than thirty dollars, the same, when taken possession of as in the preceding section mentioned, shall not be sold without five days' notice of the intended sale being first given to the bailee or his successor in interest. The notice may be personally served, or may, in the absence of such bailee or his successor in interest, be left at his residence or last known place of abode in this Island, or may be sent by registered letter, deposited in the post office at least seven days before the time when the said five days will elapse, addressed to the bailee or his successor in interest, at his last known post office address in Canada. The said five days or seven days may be part of the twenty days in section four mentioned.

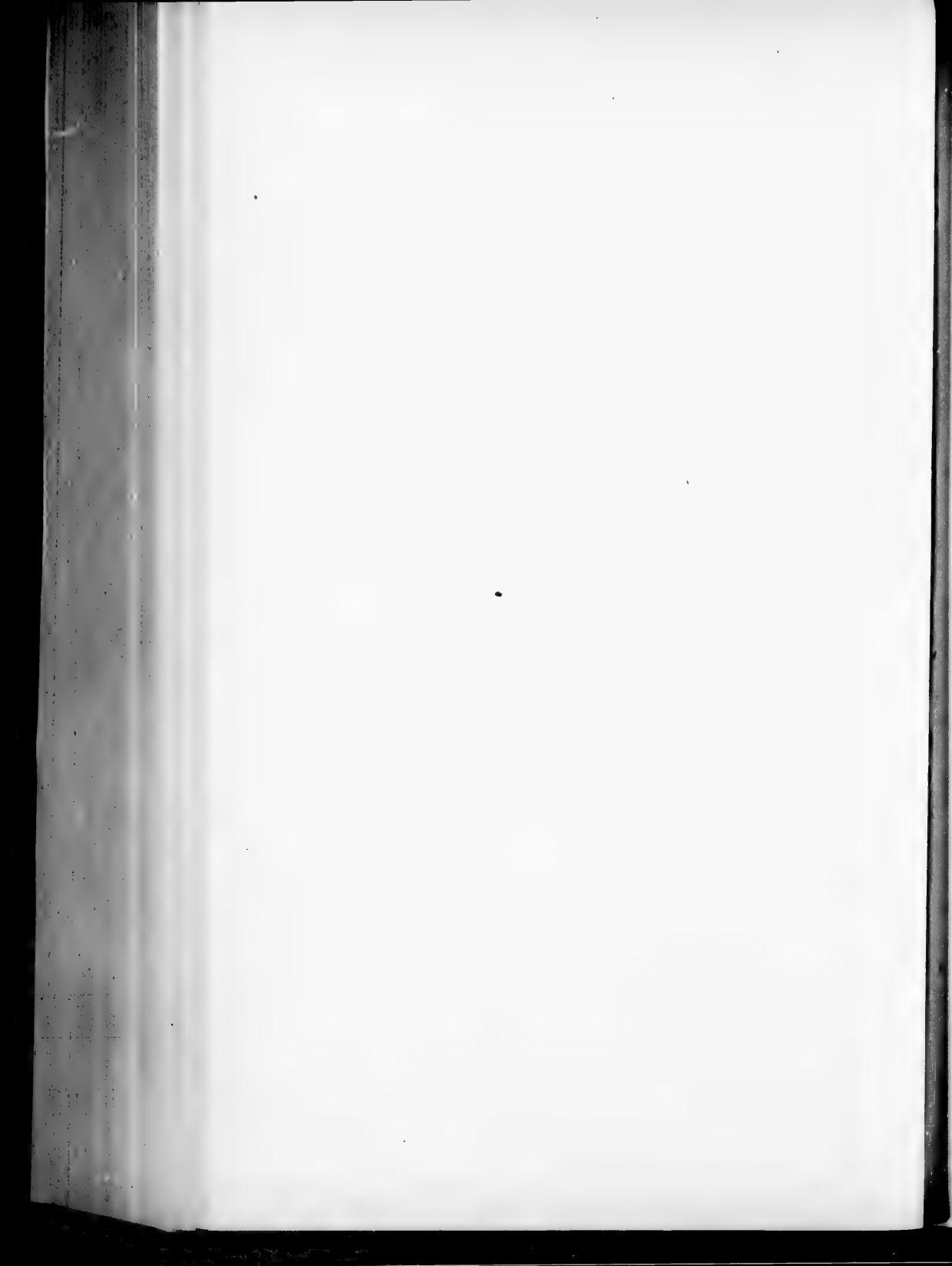
6. Filing the receipt note, etc.—Section one of this Act shall not apply to household furniture, but pianos, organs or other musical instruments are not included in the term "household furniture," when it appears in this section; nor shall section one apply to chattels where the manufacturer, bailor or vendor, within ten days from the execution of a receipt note, hire receipt, order or other instrument evidencing the loan, or conditional sale given to secure the purchase money,

or part thereof, shall file with the Prothonotary or Deputy Prothonotary of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase, a copy of the said receipt note, hire receipt, order or other instrument evidencing the bailment of conditional sale.

7. Prothonotary to file copy. The Prothonotary or Deputy Prothonotary, on receipt of such copy, shall duly file the same and cause it to be properly entered in an index book to be kept for that purpose, and shall be entitled to charge fifty cents for every such filing, and twenty cents for every search in respect thereof. A clerical error which does not mislead, or an error in an immaterial or non-essential part of the said copy so filed, shall not invalidate the said filing or destroy the effect thereof.

8. Copy to be left with conditional vendee.—The manufacturer, bailor or vendor shall leave a copy of the receipt note, hire receipt, order or other instrument by which a lien on the chattel is retained, or which provides for a conditional sale, with the bailee or conditional vendee at the time of the execution of the instrument, or within twenty days thereafter.

9. Commencement of Act.—This Act shall not come into force until the first day of July, one thousand eight hundred and ninety-six.



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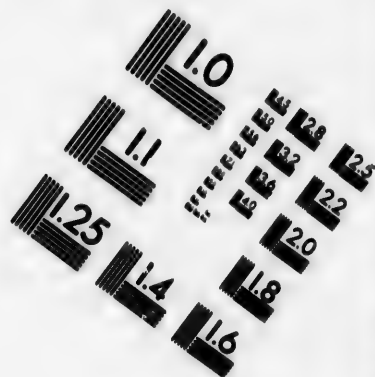
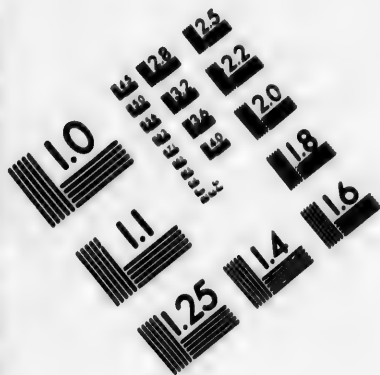
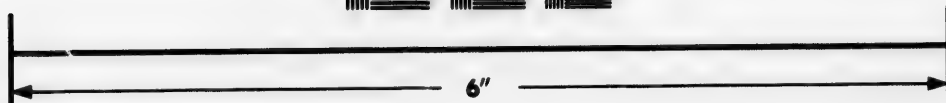
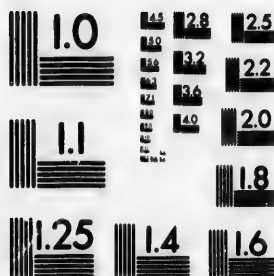


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